

Iraq's Constitution: A Drafting History

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Iraq's Constitution: A Drafting History

Ashley S. Deeks and Matthew D. Burton¹

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1. The authors were, respectively, the Legal Adviser and Deputy Legal Adviser at the U. S. Embassy in Baghdad, Iraq from June until December 2005 and currently are attorney-advisers in the Office of the Legal Adviser, U.S. Department of State. The authors have written this Article in their personal capacities, and the views expressed herein do not necessarily represent the views of either the U.S. Government or the U.S. Department of State. The authors would like to thank Jeff Beals, Pierre Boutros, Christine Sanford, Eric Pelofsky, and David Kaye for their helpful comments and other assistance in preparing this article.

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Introduction

This Article provides a drafting history of the most significant and controversial provisions of the 2005 Iraqi constitution. By offering a record of how these provisions evolved into their final form, the Article will address three key questions that inevitably arise about all constitutions: (1) how the final version of particular provisions came about; (2) what the drafters intended those provisions to mean; and (3) why the drafters ultimately chose to exclude certain draft provisions from the text. The Article accordingly creates a basic record that future Iraqi, Middle Eastern, and Western scholars may use in writing an even more comprehensive history of the constitution and of this period in Iraq's history.

As Legal Adviser and Deputy Legal Adviser, respectively, at the U.S. Embassy in Baghdad during Iraq's constitution drafting process, our primary role was to advise senior U.S. government officials about this process and about the draft texts the Iraqi negotiators produced. We followed and recorded the evolution of the constitution drafts from late June 2005, when the first set of provisions emerged from the Constitutional Committee, until mid-October of the same year, when Iraqi leaders agreed on the final set of changes. The textual analysis herein reflects a significant number of the conversations and discussions that occurred among Iraq's political leaders in the periods leading up to the August 28 declaration that the text was complete and the October 12 presentation to the Transitional National Assembly (TNA) of additions and modifications to that text.² This Article also relies on the dozens of iterations of the constitutional text produced by

2. See Dexter Filkins & Robert Worth, *The Reach of War: Politics, Leaders in Iraq Sending Charter to Referendum*, N.Y. TIMES, Aug. 29, 2005; Ellen Knickmeyer & Omar

the Constitutional Committee and other players during that time period.³

The Iraqi constitution contains 144 articles.⁴ The text of a fair number of these articles changed little, if at all, between the time that the relevant subcommittee of the Constitutional Committee first submitted them to the Constitutional Committee and the time that the political leaders declared the text to be final. Accordingly, this study focuses on only those sections or articles of the text that changed repeatedly and significantly.⁵ In particular, we address those articles that fall within seven subject areas: (1) the role of Islam in the constitution and future legislation; (2) de-Ba'athification; (3) Iraq's commitment to international law and treaties; (4) women in the constitution; (5) the development of a higher judicial body to exercise judicial review and other dispute resolution functions; (6) the allocation of power between federal and non-federal⁶ authorities, including control over natural resources; and (7) the powers of the regions.

Some of the textual language we discuss in the following sections may change in the next several months. Article 142 of the Constitution provides that the new parliament—the Council of Representatives (COR)—will form a constitutional review committee at the beginning of its work.⁷ The review committee met for the first time on November 15, 2006.⁸ According

Fekeiki, *Iraqi Assembly Adopts Changes to Draft Constitution*, WASH. POST, Oct. 13, 2005, at A16.

3. Throughout the process, a number of foreign governments, international organizations, and NGOs provided substantive and technical assistance at the request of the Iraqi government. As serious drafting intensified, drafters made early drafts of the constitution available on a limited basis to those governments and organizations working with the Iraqi government, including the United States. Iraqi newspapers also published several early drafts. As a result, much of the information contained in this Article derives from such drafts, as well as from discussions with Iraqi officials and their international advisers.

4. See IRAQ CONST.

5. Virtually all of the drafting and most of the negotiations occurred in Arabic. Official U.S. Embassy translators and/or U.S. Embassy officials fluent in Arabic translated all of the drafts upon which we rely in this Article. Although it is possible that minor mistakes occurred during this process, we are confident that there are few translation errors in the provisions that are the focus of this Article. We and other Embassy colleagues carefully reviewed each translation of a new draft, paying special attention to any additions, deletions, or changes of language from the older draft to the newer one. In addition, the translations of provisions analyzed in this Article were likely more accurate for the simple reason that most of these provisions were contentious. Iraqi negotiators therefore parsed competing formulations carefully in Arabic (and, as a result, we parsed them carefully in their English translations) at every stage of the process. Translations of all of the early drafts cited in this Article are on file with the authors.

6. Iraq is divided into eighteen governorates, and currently has one region, governed by the Kurdistan Regional Government ("KRG"), which encompasses three governorates (Arbil, Sulaimaniya, and Dohuk) and certain more limited areas within other governorates. Kurdistan Regional Gov't, *Iraq: Drafting the Constitution* (May 7, 2006), <http://www.krg.org> (follow "About KRG" hyperlink).

7. IRAQ CONST. art. 142(first).

8. See United Nations Assistance Mission for Iraq (UNAMI), News Bulletin on UNAMI Activities, Issue 10, mid-Nov. 2006, at 2, available at www.uniraq.org/FileLib/misc/Bulletin%20Nov06.doc; see also United Kingdom Foreign & Commonwealth Office, Country Profile on Iraq, <http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029394365&a=KCountryProfile&aid=>

to the constitution, within four months of its establishment, the committee must present to the COR a report containing proposed constitutional amendments.⁹ The COR will vote on the amendments and, if they pass by an absolute majority vote, the newly amended text will be presented to the general public for approval.¹⁰ Nevertheless, this Article will continue to serve as an historical record, regardless of any potential future constitutional amendments. Further, it seems unlikely that the review committee will recommend a large number of amendments to the constitutional language, given that the Shia Alliance and the Kurds, the two groups most heavily involved in drafting the text, garnered almost two-thirds of COR seats in the December 2005 election.¹¹

Two final introductory notes are necessary. First, in a number of discussions herein, we will refer to "Shia negotiators" or "the Kurdish view." We do so mostly as a matter of shorthand. Although often those of a particular ethnicity or sect shared a particular viewpoint during the negotiations, we do not intend to suggest that the negotiations were conducted exclusively along sectarian lines or that every individual from a particular "identity group" shared a single view on policy and draft language.

Second, throughout this Article we refer intermittently to the divergence of texts during the second week of August. The Shia-led TNA Constitutional Committee controlled the operative text throughout July and into early August. When it became clear that only the political principals, rather than the Committee members, would be able to make key compromise decisions on such intractable issues as how to deal with natural resources and how to create regions, the leaders convened a "leadership summit," at which the Constitutional Committee would present the issues that it had been unable to resolve. The summit convened around August 9 or 10, with a view to meeting the August 15 deadline. The Kurdish Alliance and secular Sunnis and Shia, such as Hajim al Hassani, Ghazi al Yawer, and Ayad Allawi, were frequently present.¹² However, for large parts of the

1020338054604. Because the COR was in recess during January and February 2007, the review committee is expected to produce its report by May 15, 2007.

9. IRAQ CONST. art. 142(first).

10. *Id.* art. 142(second)-(third).

11. See KENNETH KATZMAN, IRAQ: ELECTIONS, GOVERNMENT, AND CONSTITUTION 5 (Cong. Research Serv., CRS Report for Congress, Order Code RS21968, Dec. 22, 2006), available at <http://fpc.state.gov/documents/organization/78419.pdf> (last visited Jan. 27, 2007). The formal name of the Shia Alliance is the United Iraqi Alliance (UIA). It formed during the the lead-up to the January 2005 elections and consisted of the two biggest Shia parties, the Supreme Council for the Islamic Revolution in Iraq (SCIRI), led by Abdul Aziz al Hakim, and the Da'wa party, led by Ibrahim Ja'afari, who became Prime Minister during the Iraqi Transitional Government (ITG). Another party in the UIA coalition was the Iraqi National Congress, led by Ahmed Chalabi, who served as an ITG Deputy Prime Minister. *Id.*

12. Hajim al Hassani, a Sunni, served as the Speaker of the TNA. Ghazi al Yawer, also a Sunni, served as a Vice President of the ITG. Ayad Allawi, head of the Iraqi National Accord party and a secular Shia, was a TNA member and the former Prime Minister of Iraq during the Iraqi Interim Government (IIG). The Kurdish Alliance is an alliance between the Kurdistan Democratic Party (KDP), led by Massoud Barzani, President of the KRG, and the Patriotic Union of Kurdistan (PUK), led by Jalal Talabani,

summit negotiations, not all of the relevant principals attended the meetings. The Shia Alliance, represented chiefly by Abdul-Aziz al-Hakim, Ahmed Chalabi, and Humam Hamoudi (the Chairman of the Constitutional Committee), also were present for some sessions, but not to the extent necessary to make the gathering a true leadership summit.

Instead of only addressing the issues recommended by the TNA Constitutional Committee, the summit negotiators, often comprising only the Kurds and secular Shia and Sunnis, began to make changes to the entire document over successive days. By August 14, there were two drafts of the constitution: the Shia-driven TNA Constitutional Committee draft, which continued to evolve on its own; and the leadership summit document, which used the TNA draft as its starting point but moved in a different direction. As a result, on August 15, the leaders attempted to merge the two versions in order to meet the deadline. However, they were unable fully to merge the documents in time and ultimately chose to seek an extension. Despite not completing the effort to join the two documents that day, the leaders were able to merge the drafts back into one operative text shortly thereafter.

There has been considerable speculation by the press, by non-governmental organizations, and by Iraqi citizens themselves about why various provisions of the new Iraqi constitution look the way they do and about what they mean. By providing a record of how some of the most important (and most disputed) articles evolved into their final form, this Article should assist Iraqi judges, legislators, and citizens, as well as international scholars, in evaluating what the drafters intended the final provisions to mean. We also consider the role of Iraqi courts and the Council of Representatives in constitutional interpretation and anticipate some of the most difficult questions that those institutions will face in the short term.

I. Role of Islam

Human rights organizations, women's organizations, academics, and journalists have focused intently on the role of Islam in Iraq's constitution. Many commentators believe that it pervades the document, starting with the second Article, which makes Islam the official religion of the state,¹³ and running through provisions on Iraq's identity,¹⁴ the need for future laws to be consistent with the established provisions of Islam,¹⁵ personal

President of Iraq during the ITG and in the current government. Other key members include Rowsch Shaways, Vice President of the ITG, Fouad Massoum, a TNA member who played a key role on the Constitutional Committee, and Barham Saleh, ITG Deputy Prime Minister and ITG Minister of Planning.

13. See IRAQ CONST. art. 2(first). There was little dispute about this provision during negotiations. However, at an early stage of the negotiations, a Shia proposal that Article 1 describe Iraq as an Islamic state faced serious objections and faded away quickly.

14. See *id.* art. 2(second) (guaranteeing the Islamic identity of the majority of people); *id.* art. 3 ("['Iraq'] is part of the Islamic world.").

15. See *id.* art. 2(first)(a) ("No law may be enacted that contradicts the established provisions of Islam.").

status,¹⁶ and the existence of Sharia scholars on the Supreme Court.¹⁷ Others have argued that the religion-related provisions are too weak and ambiguous to have any substantial impact on their own.¹⁸ Still others, including those in the U.S. government, have argued that the constitution is progressive in the Middle East because it recognizes freedom of belief for all, and that it synthesizes Islam with the internationally recognized principles of democracy and human rights.¹⁹

The negotiations on these issues were among the most contentious of the entire process, less because of their substantive complexity and more because of what references to Islam in the constitution connote—in the views of some—for rights and protections therein, as well as for future laws enacted under the constitution.²⁰ Early drafts contained a number of hot-button provisions such as references to holy places in Iraq, and a Shia-driven provision describing the sacredness of the “marja’iya,” the Shiite religious authority,²¹ that negotiators eventually toned down or deleted. This section will discuss four provisions: Article 2’s description of Islam as “a foundation source” of legislation;²² Article 2’s “repugnancy clause;”²³ Article 2(second)’s guarantees of religious rights to individuals;²⁴ and Arti-

16. See *id.* art. 41 (“Iraqis are free in their commitment to their personal status according to their religions, sects, beliefs, or choices, and this shall be regulated by law.”).

17. See *id.* art. 92(second) (“The Federal Supreme Court shall be made up of . . . experts in Islamic jurisprudence . . .”).

18. See Kristen Stilt, *The Iraqi Constitution: A Closer Reading*, http://www.npr.org/news/specials/iraqi_constitution/#issue1 (last visited Jan. 27, 2007) (arguing that the major Islam-related provisions are relatively weak and ambiguous, and that the COR and the Supreme Court will ultimately be responsible for determining how great a role Islam should play in the Iraqi state).

19. See, e.g., Press Release, White House Office of the Press Secretary, Fact Sheet: Democracy in Iraq (Dec. 12, 2005), available at <http://www.whitehouse.gov/news/releases/2005/12/20051212-1.html> (last visited on Jan. 27, 2006) (describing Iraq’s constitution as the most progressive, democratic constitution in the Arab world).

20. For example, on July 20, women demonstrated in downtown Baghdad, complaining about the draft constitution. In particular, the protestors were concerned about a draft provision then circulating that would have eliminated the personal status code and replaced it with Sharia law provisions on personal status issues. See Edward Wong, *Iraqi Constitution May Curb Women’s Rights*, N.Y. TIMES, July 20, 2005, at A8.

21. See Mehdi Khalaji, *The Last Marja: Sistani and the End of Traditional Religious Authority in Shiism*, at 1 (The Washington Inst. for Near East Policy, Policy Focus # 59, Sept. 2006), available at <http://www.washingtoninstitute.org/pubPDFs/PolicyFocus59final.pdf> (describing the marjaiya as the religious authority of Shiism).

22. IRAQ CONST. art. 2(first) (“Islam is the official religion of the State and is a foundation source of legislation.”).

23. *Id.* art. 2(first)(a)-(c) (“No law may be enacted that contradicts the established provisions of Islam. No law may be enacted that contradicts the principles of democracy. No law may be enacted that contradicts the rights and basic freedom stipulated in this Constitution.”).

24. *Id.* art. 2(second) (“This Constitution guarantees the Islamic identity of the majority of the Iraqi people and guarantees the full religious rights to freedom of religious belief and practice of all individuals such as Christians, Yazidis, and Mandeans.”).

cle 41, on the law governing personal status.²⁵ While Article 92, which includes experts in Islamic jurisprudence on the Federal Supreme Court,²⁶ falls within this family of issues, we discuss it in the section on the judiciary.

A. Article 2: Islam as a Foundation Source

Article 2(first) states:

Islam is the official religion of the State and it is a foundation source of legislation:

(A) No law that contradicts the established provisions of Islam may be enacted.

(B) No law that contradicts the principles of democracy may be enacted.

(C) No law that contradicts the rights and basic freedoms stipulated in this constitution may be enacted.²⁷

Two primary issues arise from the clause providing that Islam is a foundation source of legislation: whether Islam is one source of legislation or the only source, and how important a source it is.

1. "A" Source of Legislation

The first debate centered on whether to use the indefinite article "a" instead of the definite article "the" when describing the underlying role Islam would play in shaping future laws. The Transitional Administrative Law (TAL) provided that Islam "is to be considered a source of legislation."²⁸ The very first publicized draft of a number of articles of the constitution, which appeared in the Iraqi newspaper *Al Mada*, contained only one reference to Islam—in the context of the reconciliation of a woman's roles in society—and no mention of Islam as a restraining principle on legislation.²⁹ However, the draft that emerged from the TNA Constitutional Committee on July 22 contained a set of provisions on Islam similar to the language that ended up in Article 2(first). That draft text stated that Islam is the official religion of the State, and that "[i]t is the basic source of legislation. No law may be enacted that contradicts its tenets and provisions [its tenets that are universally agreed]."³⁰ This version reflects the fact that, in the early stage of negotiations, some Shia Islamists, particularly from

25. *Id.* art. 41 ("Iraqis are free in their commitment to their personal status according to their religions, sects, beliefs, or choices, and this shall be regulated by law.").

26. *Id.* art. 92(second).

27. *Id.* art. 2.

28. Law of Administration for the State of Iraq for the Transitional Period art. 7, Mar. 8, 2004, available at <http://www.cpa-iraq.org/government/TAL.html> [hereinafter TAL] (emphasis added).

29. IRAQ CONST. art. 5(4) (June 30, 2005 *Al-Mada* draft), translated in NATHAN J. BROWN, CARNEGIE ENDOWMENT FOR INT'L PEACE, CONSTITUTION OF IRAQ: DRAFT BILL OF RIGHTS 9 (2005), <http://www.carnegieendowment.org/files/BillofRights.pdf>.

30. IRAQ CONST. § 1, art. 2 (July 22, 2005 draft). The bracketed text represents a proposed alternate phrasing to "its tenets and provisions." Presumably both were being considered at the time among the Constitutional Committee members.

the Supreme Council for the Islamic Revolution in Iraq (SCIRI), pushed to make Islam “the” basic or fundamental source of legislation. However, other negotiators, including the Kurds, felt strongly that it should be only one of several sources, such that the appropriate article was “a.” In fact, in a set of Kurdish proposals for the draft Constitution, published in the *Al Taakhi* newspaper on July 28, the comparable provision states, “Islam. . . is considered a source of legislation.”³¹

The August 2 draft still described Islam as “the” source of legislation.³² Constitutional Committee members noted in a press conference on July 31 that they believed that the negotiators would work on the issue at the summit to be convened by Massoud Barzani around August 9.³³ The U.S. Government made public its strong concerns about using “the,” given the implication that making Islam the single source of law might have led to a more strictly Islamic state that precluded secularism.³⁴ By August 6, a number of competing phrasings had appeared: “the fundamental source,” “the first source,” “the basic source,” “a main source,” “a source among sources,” and “a fundamental source.”³⁵ The Kurds continued to prefer the TAL language, which used “a source,” and they ultimately prevailed. Perhaps one explanation for this is that Grand Ayatollah Sistani allegedly made clear through intermediaries that he was comfortable with “a” source. Shortly thereafter, around August 10, the drafts reflect the use of the indefinite article—“a principal source”—and never go back to the definite article.³⁶

A decision to use Sharia as “the” source may have created a number of problems. For example, many believe that Sharia does not and cannot address the wide range of subject matters that contemporary civil law does.³⁷ Sharia most clearly addresses issues of inheritance, family law (marriage and divorce), criminal law, and contracts, but does not offer

31. IRAQ CONST. § 1, art. 2 (July 28, 2005 KRG draft).

32. IRAQ CONST. § 1, art. 2 (Aug. 2, 2005 draft).

33. Notes on file with authors.

34. See Interview by Wolf Blitzer with Ambassador Zalmay Khalilzad (Aug. 14, 2005), http://iraq.usembassy.gov/iraq/20050814_khalilzad_cnn.html. Ambassador Khalilzad states:

The difference between ‘the’ and ‘a’ source, or a principal source, is that there are other sources that also have to be respected and taken into account. That’s the principles of democracy, principles of human rights, and we do not want to see a hierarchy of sources. And I believe that ultimately, the answer will be ‘a’, not ‘the’, and that these other sources will also have to be recognized as important sources of laws in this new Iraq.

The implication that the use of “the” would render Iraq a strict Islamic state is not a necessary conclusion, however: Egypt’s constitution states that “the principle source of legislation is Islamic Jurisprudence (Sharia),” but few would describe Egypt as a strictly Islamic state. EGYPT CONST. art. 2.

35. See, e.g., IRAQ CONST. § 1, art. 2 (July 22, 2005 draft); IRAQ CONST. § 1, art. 2 (Aug. 6, 2005 draft).

36. IRAQ CONST. § 1, art. 2 (Aug. 10, 2005 draft).

37. Andrew Grossman notes that “Islamists argue that Sharia is a complete set of laws and that no man-made laws have a place in the Muslim State.” *Finding the Law: Islamic Law (Sharia)*, (Aug. 1, 2002), <http://www.llrx.com/features/islamiclaw.htm>. We are not aware of any negotiators who took this position during negotiations.

direct guidance on other areas requiring legal regulations, such as corporations, labor, copyright, treaties, government structures and authorities, intellectual property, and telecommunications.³⁸ Further, Iraqi law has extensively codified criminal law and procedure;³⁹ to require Sharia to be the exclusive source of law may have curbed the use by Iraqi lawyers and judges of now-familiar laws and permitted the use of certain punishments that might be considered cruel and unusual by international standards.⁴⁰ At the end of the day, however, this debate appeared to be as much a political fight about the role and potency of Islam in Iraqi daily life as it was about practical concerns about the legal effects such a provision would have on Iraqi laws.

2. A "Foundation Source"

The second debate focused on the phrase "a foundation source." It began in the July 22 draft as "basic" or "principal" (*ra'isi*) source,⁴¹ moved to "fundamental," (*asasi*) and then back to "basic" or "principal" (*ra'isi*) again. Although the meaning of these words in English seems quite similar, the negotiators seemed to view the two Arabic words as having different implications for the relationship between Islam and other sources of law. Secular negotiators believed that using the word "principal" to describe Islam's role as a source of law created a stark dichotomy between Islam and other sources of law, in which Islam clearly would be the first or primary source. By contrast, "fundamental" placed Islam in an important position as a source of law for such negotiators but plausibly allowed other fundamental sources of law to exist alongside Islam.

At the house of Vice President Adil Abdel Mahdi on August 14, one of the leaders of SCIRI was still pushing for "the principal source of law." The next day, there appeared to be agreement in the Shia Alliance on "a funda-

38. The Malaysian constitution, for instance, restricts the application of Islamic law to enumerated areas, including succession, marriage, divorce, adoption, gifts and trusts, charities, mosques and places of worship, establishment and procedure in Sharia courts, and the determination of matters of Islamic law and doctrine. See MALAY. CONST., Ninth Schedule, List II.

39. Criminal Procedure Law, Law No. 23 (1971) (Iraq); Penal Code, Law No. 111 (1969) (Iraq).

40. The International Covenant on Civil and Political Rights, to which Iraq is a party, provides that no one shall be subject to torture or cruel, inhuman, or degrading treatment. International Covenant on Civil and Political Rights art. 7, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]. The Sharia punishments of death by stoning for adultery or pre-marital sex and of amputation of hands and feet for the offenses of theft and robbery often have been criticized as constituting torture or cruel, inhuman, or degrading punishment. See, e.g., Human Rights Watch, *Nigeria: First Execution under Sharia Condemned*, Jan. 8, 2002, <http://hrw.org/english/docs/2002/01/08/nigeri3454.htm> (citing flogging and amputation as cruel punishment); Ismene Zarifis, *Rights of Religious Minorities in Nigeria*, 10 HUM. RTS. BRIEF 22, 23 (stating that amputation is "seriously contested by members of the international human rights community . . . due to [its] apparent violation of the right to life and the right to be free from torture or cruel, unusual, or degrading punishment").

41. IRAQ CONST. § 1, art. 2 (July 22, 2005 draft) (using "basic" or "principal"); IRAQ CONST. § 1, art. 2 (August 6, 2005 draft, early translation) (using "fundamental"); IRAQ CONST. § 1, art. 2 (August 11, 2005 draft) (using "basic" or "principal").

mental source,” with both SCIRI and Da’wa⁴² leaders seeming to consent to this formulation. On August 19, however, a non-Islamist leader pushed to take out “a fundamental source of law” entirely and simply state that the constitution will respect the Islamic identity of Iraq. Eventually, those who continued to insist on the inclusion of a “fundamental” source of law won. Adding to the confusion, between the reading of the draft to the TNA on August 28 and the United Nations’ printing of the text, drafters changed the word from “*asasi*” to “*asas*.” This changed the word from the adjectival “fundamental” to a noun that is best translated as “foundation.”

What did the drafters mean by including a provision stating that Islam is “a foundation source” of legislation?⁴³ Cherif Bassiouni describes Islamic law as follows: “Sharia contains the rules by which a Muslim society is organized and governed, and it provides the means to resolve conflicts among individuals and between the individual and the state.”⁴⁴ Of course, Sharia is not one fixed, written body of law. Its sources include the *Qur’an* and the *sunna* (accounts of the Prophet’s decisions, words, and deeds), but there are certain differences between Sunni and Shia approaches to Sharia jurisprudence, and a fair number of Sharia rules stem from *ijtihad*, or reasoning by analogy, rather than from clear directives on specific subjects.⁴⁵ Given the non-codified and somewhat varying forms of Sharia, and given that Sharia does not contain provisions on many subjects of modern legislation, it is not clear what import this provision will have as a practical matter.

On the one hand, there is no comparable statement about other entities or concepts being sources of law for Iraq; thus, Islam ends up with pride of place in this area. Future courts might construe this clause on Islam as a “gap-filling” provision in the absence of codified law on an issue.⁴⁶ On the other hand, the provision does not impose actual obligations on future legislators or on the Federal Supreme Court. It is descriptive rather than prescriptive. If Iraq’s brief democratic experience is any guide, we only once saw or heard legislators refer to Islam as a source of law during the year in which the TNA produced legislation under the

42. See *supra* note 11.

43. This Article uses the terms “Islamic law” and “Sharia” interchangeably. Although “Islam” is a broader concept than “Islamic law,” those parts of Islam that might form a basis for Iraq’s legislation seem likely to be contained in Islamic law. Thus, the fact that the constitution’s drafters refer to “Islam” rather than “Islamic law” or “Sharia” as a source of legislation does not seem to be an important distinction.

44. See M. Cherif Bassiouni, *Introduction to Islam*, available at <http://www.mideasti.org/indepth/islam/law.html>.

45. *Id.*; see also Kristen Stilt, *Islamic Law and the Making and Remaking of the Iraqi Legal System*, 36 GEO. WASH. INT’L L. REV. 695, 720–22 (2004) (explaining the constituent parts of Islamic law).

46. See, e.g., AFG. CONST. art. 130(2). (“When there is no provision in the Constitution or other laws with respect to a case under consideration, the courts’ decisions shall be within the limits of this Constitution in accord with the *Hanafi* jurisprudence and in a way to serve justice in the best possible manner.”).

TAL.⁴⁷ (Of course, this might be because legislators frequently did not choose to legislate in areas in which Islam might have served as a source of guidance.)⁴⁸ In sum, the provision may mean more as a symbolic gesture, honoring the central importance of Islam to the lives of many Iraqis, than as a fount of future legislation or of amendments to existing legislation. It is possible, however, that the latent ambiguity in this provision will prove to be a source of future sectarian dissension.

3. *Repugnancy Clauses*

A provision in a constitution stating that no law shall contradict certain principles often is referred to as a “repugnancy clause.”⁴⁹ A number of Islamic countries have repugnancy clauses, usually invoking Islamic principles as the principles that cannot be contradicted.⁵⁰

Article 2(first)’s listing of the three sets of principles to which Iraq’s domestic laws cannot run counter has three elements worth discussing. The first is the sheer fact of the provision’s existence. The second is a consideration of the term it uses to describe the part of Islam that future laws may not contradict—that is, “established principles.” The third is the source of the other two repugnancy clauses (related to democracy and basic rights) and their legal effect.

(a) *Import of a Repugnancy Clause*

What will the constitution’s repugnancy clause do? The provision is directed at Iraqi domestic laws, and is not expressly directed internally at other constitutional provisions.⁵¹ Even though the provision refers to law that “may be enacted,” which might be read as directed only at future laws, we saw no evidence that the drafters intended to cabin this restriction only

47. In that example, legislators referred to Sharia in the law governing the Iraq Commission for Resolution of Real Property Disputes, enacted by the TNA in early 2006. Article 38 of this law provides that “[t]he Cassation Board must refer to the Sharia jurists and take by their opinions in case one of the parties to the lawsuit petitions for such.” Even here, the TNA did not mandate the use of Sharia, but instead made it an option for parties to a dispute.

48. Despite Nathan Brown’s predictions, the TNA did not take up debates on the personal status law, apart from its discussion of personal status during constitutional negotiations. See NATHAN BROWN, CARNEGIE ENDOWMENT FOR INT’L PEACE, POLICY OUTLOOK, *DEBATING ISLAM IN POST-BAATHIST IRAQ 2* (March 2005), <http://www.carnegieendowment.org/files/PO13.Brown.FINAL2.pdf>.

49. See Daniel J. Hulsebosch, *The Ancient Constitution and the Expanding Empire: Sir Edward Coke’s British Jurisprudence*, 21 *LAW & HIST. REV.* 439, 477 (2003) (explaining derivation of repugnancy clauses).

50. See AFG. CONST. art. 3 (“[N]o law can be contrary to the beliefs and provisions of the sacred religion of Islam.”); MALDIVES CONST., art. 43 (“Nothing shall be done in violation of Sharia or the Constitution.”); PAK. CONST. art. 203(D)(3) (“If any law or provision of law is held by the Court to be repugnant to the injunctions of Islam, (a) the President . . . or the Concurrent Legislative List, or the Governor . . . shall take steps to amend the law so as to bring such law or provision into conformity with the Injunctions of Islam; and (b) such law or provision shall, to the extent to which it is held to be so repugnant, cease to have effect on the day on which the decision of the Court takes effect.”).

51. See IRAQ CONST. § 1, art. 2.

to future laws. Thus, the better reading may be that the provision will apply not only to future domestic laws, but also to Iraqi laws currently in effect.⁵² However, one would expect that Article 2 could not be used to directly undermine other provisions in the constitution that might conflict with Islam.

The TAL itself contained a three-pronged repugnancy clause. It stated, "No law that contradicts the universally agreed tenets of Islam, the principles of democracy, or the rights cited in Chapter Two ["Fundamental Rights"] of this Law may be enacted during the transitional period."⁵³ We are not aware that this Article played any role, either as a guidepost or a limiting factor, in any legislation enacted by the TNA. Simply because the comparable TAL provision played no meaningful role in law-making during the transitional period, however, does not mean that this constitutional provision will have no effect. Since the COR will need to enact many new laws to fulfill the mandates of the constitution, the tripartite repugnancy clause almost certainly will have an impact on the development and evolution of laws implementing constitutional rights, as well as other laws enacted by the legislature.⁵⁴ We should expect the COR to engage in heated debates on this subject and to take the "first cut" at deciding whether a particular draft law does or does not run afoul of established provisions of Islam. The Supreme Court, of course, will be the ultimate arbiter of constitutional provisions,⁵⁵ so the repugnancy clause will also offer ammunition for litigants who choose to challenge an Iraqi law on the ground that the law violates one or more of the three prongs of Article 2. Further, the clause, because it contains several bases for challenging legislation, eventually may lead the Court to develop a principle of statutory interpretation akin to the one in U.S. jurisprudence, under which courts will construe statutes to avoid possible constitutional conflicts, if multiple statutory readings are available.⁵⁶

52. The constitution provides that existing laws will remain in effect after the constitution comes into force as long as the COR does not amend or rescind them, *id.* art. 130, or a court does not declare them inconsistent with the constitution and therefore void, *id.* art. 13.

53. TAL, *supra* note 28, art. 7(A). Nathan Brown, in his analysis of the TAL, describes the debate that led to TAL Article 7. His description of the compromises involved in achieving the Article's final text sounds similar to the compromises that led to the inclusion of the comparable article in the constitution. See Nathan J. Brown, *Transitional Administrative Law, Commentary and Analysis*, March 7-8, 2004, <http://www.geocities.com/nathanbrown1/interimiraqiconstitution.html>. Interestingly, the Arabic translation of Article 7 of the TAL does not contain the word "universally."

54. Over fifty articles in the constitution provide that a "law shall regulate" an element of a right contained therein. Even if the COR concludes that existing Iraqi law meets a number of these requirements, the COR still has a large number of issues on which it must legislate, including topics ranging from how regions may be created, *id.* art. 118, to how the federal, regional, and governorate governments will work together to manage oil and gas, *id.* art. 112, to exemptions that would permit foreign ownership of immovable assets, *id.* art. 23(third).

55. *Id.* art. 93(first-third).

56. See *I.N.S. v. St. Cyr*, 533 U.S. 289, 290 (2001) ("[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an

The provision is also notable in that it assumes that there is no inherent conflict between the established provisions of Islam, the principles of democracy, and the rights and basic freedoms protected by the Iraqi constitution. However, the provision's reference to Islam could effectively apply Sharia rules and standards, albeit indirectly, to non-Muslim Iraqis, even though Sharia, as a general rule, only applies to Muslims.⁵⁷ In any event, we might expect that the COR—especially one with a substantial number of Islamist members—will be keenly aware of this provision as it crafts future legislation.

(b) Established Provisions of Islam

The July 22 draft contained a set of provisions on Islam similar to part of the repugnancy language that ended up in Article 2. That text, which originally addressed only Islam, stated, “No law may be enacted that contradicts [Islam’s] tenets and provisions (its universally agreed principles).”⁵⁸ The language in parentheses reflects the start of a long-running debate about how extensively agreed upon the Islamic principles must be before they may be used to set limitations on Iraq’s laws. By August 10, the phrase had become “Islam’s confirmed rulings,” though some negotiators had already proposed adding “or the principles of democracy” and “the fundamental rights and freedoms in the constitution,” to mirror TAL Article 7.⁵⁹ Draft Article 3 had stated, “Freedoms and the fundamental rights included in the Constitution are guaranteed for all. No law may be enacted that belittle[s] them.”⁶⁰ Thus, the eventual addition of the “rights and freedoms” clause to Article 2 was largely a merger of two separate but related clauses. By August 13, with agreement on this provision seemingly stalled, some talked about returning to the language of the TAL. The working sentence became, “No law may be enacted that contradicts (a) the universally agreed tenets of Islam; (b) the principles of democracy; or (c) the freedoms and fundamental rights found in this constitution.”⁶¹ However, certain Shia negotiators wanted to use the phrase “constant rulings,” “confirmed rulings,” or “the tenets of its provisions” and to exclude items (b) and (c). Their view was that “universally agreed tenets” was basically meaningless, because few provisions in Islam would meet this test. The Kurds believed that the Shia-proposed language was too fundamentalist. By August 21, the group had settled on “established provisions” as the compromise, leaving the language somewhere between the narrow “universally agreed tenets” and the broad and ambiguous “tenets of its

alternative interpretation of the statute is ‘fairly possible,’ we are obligated to construe the statute to avoid such problems.” (citation omitted)).

57. See, e.g., Elizabeth Peiffer, *The Death Penalty in Traditional Islamic Law and as Interpreted in Saudi Arabia and Nigeria*, 11 WM. & MARY J. WOMEN & L. 507, 528 (2005) (noting that Sharia, as incorporated in Nigerian criminal law, only applies to Muslims).

58. IRAQ CONST. § 1, art. 2 (July 22, 2005 draft).

59. IRAQ CONST. § 1, art. 2 (Aug. 10, 2005 draft).

60. IRAQ CONST. § 1, art. 3 (Aug. 6, 2005 draft).

61. IRAQ CONST. § 1, art. 2 (Aug. 13, 2005 draft).

provisions.”⁶²

The phrase used in Arabic for “established provisions” suggests a broader incorporation of Islam into the constitution. There were a few reasons why non-Shia Islamic negotiators objected to this formulation. Some thought it connoted a wide-ranging and voluminous field of Islamic jurisprudence against which Iraqi law would be measured. Other secularists feared that the word “*ahkam*” could incorporate fatwas as a type of ruling. Finally, even Sunni Islamists opposed this formulation, and supported a less Islamic tone, because they believed that the “provisions” or “rulings” incorporated would only be from Shia Islam.

On the other hand, a number of Iraqis not associated with the negotiations largely confirmed the Shia negotiators’ view that very few principles may be considered “universal tenets of Islam.” Indeed, although the TAL phrase is translated as “universal tenets,” a more accurate translation may have been the “gathered around principles;” i.e., only those principles for which consensus existed. Thus, the phrase might effectively be limited to such firmly established rules and practices as prayer, the pilgrimage to Mecca, fasting during the month of Ramadan, purification rituals before prayer, and the prohibition of alcohol.⁶³ That said, it remains far from clear what provisions will and will not be deemed to constitute “established provisions” of Islam for purposes of this constitutional provision.

(c) “Principles of Democracy” and “Rights and Basic Freedoms”

In the middle of August, as the sides continued to struggle with the language related to Islam, one compromise put on the table was to counterbalance somewhat broad limitations on laws violating aspects of Islam with a provision that would prevent those same laws from violating the principles of democracy. Once this idea attracted some support, others suggested returning to the tripartite structure of the TAL. However, the Shia continued to object to “principles of democracy.” On August 19, a Shia negotiator tried to bridge that gap by offering “practices of democracy” as a compromise. To the extent that secular negotiators perceived the inclusion of “principles of democracy” as their effort to counterbalance one worldview against another, a change to the “practices” of democracy could have been seen as weakening that balance.

As with the phrase “established provisions of Islam,” one must ask, “What exactly are ‘principles of democracy?’” Whereas “democratic practices” might be thought to mean things like regular elections, membership in political parties, and a role for non-governmental organizations and the media in questioning governmental policies and acts, “democratic principles” may be seen as both deeper and broader. These principles might include accountability of government; rights and responsibilities of citizens; the rule of law; checks and balances within government; and protec-

62. IRAQ CONST. § 1, art. 2 (Aug. 21, 2005 draft).

63. See Stilt, *supra* note 45, at 744.

tion of minority rights. Larry Diamond, who spent time in Iraq during the U.S. occupation, has described democracy as follows:

Democracy is a system of government in which the people are able to choose their leaders, and to replace their leaders, in regular, free and fair elections.

But democracy is about more than just elections. It also protects the human rights of citizens to think for themselves, to practice their religion, to express themselves, organize, and demonstrate.

Democracy provides a rule of law that protects the rights of citizens, maintains order, and limits the power of government. In a democracy, no one is above the law, not even a king or an elected president. The law is fairly, impartially, and consistently enforced, by courts that are independent of the other branches of government.

Democracy gives power to the majority, but not absolute power. The rights of minorities are preserved and meaningful participation is guaranteed for all.⁶⁴

A number of proponents of the “principles of democracy” phrasing understandably believed that altering the phrase to reference only the “practices of democracy” would have notably narrowed the concept.

It was not clear what part of “democratic principles” the Shia negotiators (and SCIRI members) found objectionable. SCIRI’s concern may have been about the inclusion of an ideological structure that might be seen to rival Islam. “Democratic practices,” on the other hand, might be seen as non-threatening to theocratic principles. For example, Iran, a theocracy, still holds periodic elections, which are at the core of democratic practices. Moreover, democratic practices unambiguously benefited Shia groups because the majority of Iraq’s population is Shiite. Put another way, SCIRI’s interest may have been simply to water down anything that stood shoulder-to-shoulder with the principles of Islam. Of course, the COR and the Supreme Court alike will need to determine for themselves precisely what they believe “principles of democracy” are. They will also need to determine whether ambiguous provisions of the constitution establish actual “rights” and whether the constitution drafters meant to limit the scope of Article 2(first)(c) by referring only to “basic” freedoms rather than to all freedoms. There was, to our knowledge, no attempt to apply the comparable TAL provision while the TAL remained in force, so there is no Iraqi historical practice in this area.⁶⁵

4. *Respect for Religious Identities*

The TAL provided, “This Law respects the Islamic identity of the majority of the Iraqi people and guarantees the full religious rights of all individuals to freedom of religious belief and practice.”⁶⁶ Article 2(sec-

64. Larry Diamond, *Key Democratic Principles of Iraq's Transitional Administrative Law, Remarks in Salah ad Din Governorate*, March 21-22, 2004, <http://www.stanford.edu/~ldiamond/iraq/speechTAL032104.htm>.

65. TAL, *supra* note 28, art. 7(A).

66. *Id.*

ond) of the Constitution states, "This Constitution guarantees the Islamic identity of the majority of the Iraqi people and guarantees the full religious rights to freedom of religious belief and practice of all individuals such as Christians, Yazidis, and Mandeian Sabians."⁶⁷ This provision is notable because it guarantees individuals (as opposed to only groups) the right to freedom of belief and practice. However, it does not state that the right attaches to individuals "in community with others" nor that individuals have the right to choose their religion, both of which are elements included in Article 18 of the International Covenant on Civil and Political Rights (ICCPR), to which Iraq is a party.⁶⁸

The language that became Article 2(second) saw many incarnations. A July 22 version stated, "This Constitution shall preserve the Islamic identity of the majority of the Iraqi people (by its Shiite majority and its Sunnis) and shall respect all other religions' rights."⁶⁹ On July 28, the Kurds' proposal proffered, "The constitution respects the Islamic identity of the majority of the Iraqis and ensures the full religious rights of Christians, [Yazidis], [Mandeans], and Chaldeans in free belief and practice."⁷⁰ It also offered as an alternative, "The constitution respects the Islamic identity of the majority of Iraqis and ensures full religious rights and beliefs of non-Muslim Iraqis."⁷¹ On August 6, the main draft became even more detailed, focusing both on religions and on the ethnic identities of groups commonly affiliated with those religions:

This Constitution shall preserve the Islamic identity of the majority of the Iraqi people by its Shiite majority and its Sunnis from the Arabs, Kurds, Turkmen, and [Shabak], and shall respect the rights of all other religions, including Christians, among them the [Chaldeans], Assyrians, Syriacs, Armenians, [Yazidis], and [Mandeian Sabians]."⁷²

Then, for some time, the clause fell away entirely.

On August 17, the phrase returned as, "This Constitution shall respect the Islamic identity of the majority of the Iraqi people and shall guarantee all the religious rights of all individuals in the freedom of belief and religious practice."⁷³ This version is the kernel of the final text: the drafters have deleted all reference to the "Shiite majority," at the strong encouragement of Sunni negotiators and others sensitive to Sunni negotiating positions. Two significant changes were made to the August 17 text. First, the

67. IRAQ CONST. art. 2(second).

68. ICCPR, *supra* note 40, art. 18(1).

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

Id.

69. IRAQ CONST. § 1, art. 2 (July 22, 2005 draft).

70. IRAQ CONST. ch. 1, art. 2 (July 28, 2005 KRG draft).

71. *Id.*

72. IRAQ CONST. § 1, art. 2 (Aug. 6, 2005 draft).

73. IRAQ CONST. § 1, art. 2(second) (Aug. 17, 2005 draft).

negotiators agreed to replace “respects the Islamic identity” with “guarantees the Islamic identity.”⁷⁴ Second, the negotiators decided to provide specific examples of groups of individuals whose religious rights were guaranteed, rather than leave the provision more generic.⁷⁵

The first change was made as a result of Shia concern about use of the word “guarantees” in the second clause of the sentence. Rather than dilute the second clause, such that the constitution would only “respect” the full religious rights of all individuals to freedom of religious belief and practice, the drafters compromised by agreeing to use equally strong (“guarantees”) language in the first clause of the sentence. Nevertheless, a number of commentators have expressed concern about what it means to “guarantee” the Islamic identity of the majority of Iraqis, and about whether this provision will permit future legislators to take measures that limit the freedom of religion of non-Muslims by invoking the mandate of this Article.⁷⁶

The second change began with an effort on August 22 to create an exclusive list of groups that would be entitled to the religious rights at issue, and ended with the decision on August 26 to include a specific, non-exclusive list of ethno-religious groups to the generic reference “all individuals.”⁷⁷ Of course, on August 6, there had been a detailed list of ethno-religious groups.⁷⁸ However, the drafters then removed these references from the text, in part because the “Shiite majority” phrase had dropped away, leaving no need to cite either Christian sects or non-Shia sects and ethnicities that followed Islam, and also because drafters disputed whether certain ethnicities, such as the Shabak, even existed. However, after August 17 the Kurds and others—perhaps in response to what they were hearing from minority communities—began to argue that it was important to list such groups.⁷⁹ At the same time, the Kurds emphasized the need to ensure that any list would not be seen as exclusive—hence the use of “such as” before the list.⁸⁰ The Kurds also considered whether adding “and others” to the end of the list would help make that point. Some objected that using “and others” could marginalize all groups encompassed by the term “others.” In the end, “and others” was rejected, though all negotiators with

74. IRAQ CONST. § 1, art. 2(second) (Aug. 22, 2005 draft).

75. IRAQ CONST. § 1, art. 2(second) (Aug. 26, 2005 draft).

76. See, e.g., Nina Shea & John F. Cullinan, *Constitutional Concerns*, NATIONAL REVIEW ONLINE, Aug. 29, 2005, <http://www.nationalreview.com/comment/she200508290941.asp>; U.S. Comm’n on Int’l Religious Freedom (USCIRF), *Iraq’s Permanent Constitution: Analysis and Recommendations* (Mar. 2006), available at http://www.uscifr.gov/countries/region/middleeast/iraq/03212006_iraq.html [hereinafter USCIRF Report] (asserting that “[g]uaranteeing Islamic identity may place the state in the role of protecting Islam, which in turn may permit the criminalization of apostasy, blasphemy, and other ‘offenses against religion,’ as well as result in discrimination against non-Muslims in a variety of areas”).

77. IRAQ CONST. § 1, art. 2(second) (Aug. 22, 2005 draft); IRAQ CONST. § 1, art. 2(second) (Aug. 26, 2005 draft).

78. IRAQ CONST. § 1, art. 2 (Aug. 6, 2005 draft).

79. It is not clear to us why these three particular religious or ethno-religious groups ended up as the listed examples.

80. IRAQ CONST. art. 2.

whom we spoke seemed to share the view that the list remained non-exclusive.

The meaning of the constituent parts of Article 2(second) is not immediately clear. On its surface, the language gives a certain importance to the role of Islam in Iraq, as the majority religion; however, it also takes a balancing step to protect the religious rights of non-Muslims in Iraq. Constitutions of several other Middle Eastern countries do not offer similar protection for religious freedom on an individual basis.⁸¹ When Article 2 is read in connection with Articles 14 and 42, it appears that the constitution fairly protects group and individual religious rights and individual freedom to choose a religion.⁸²

B. Article 41: Personal Status

Article 41, generally referred to as the “personal status” provision, states, “Iraqis are free in their commitment to their personal status according to their religions, sects, beliefs, or choices, and this shall be regulated by law.”⁸³

1. What is “Personal Status”?

Personal status issues include rights and obligations related to marriage, divorce, inheritance, adoption, and paternity.⁸⁴ Many constitutions in the region that address personal status cement Sharia as a source or the source of law or guidance in these areas. Jordan’s constitution contains a provision stating that Sharia courts shall have exclusive jurisdiction over matters of personal status of Muslims and matters pertaining to *waqfs* (Islamic religious endowments or trusts).⁸⁵ In Malaysia, Islamic law applies in certain enumerated areas, including succession, marriage, divorce, and adoption.⁸⁶ Similarly, under the Gambian constitution, Sharia may be used as a source of law only for matters of marriage, divorce and inheritance.⁸⁷ In Bahrain, inheritance is covered by Sharia.⁸⁸ Iran’s constitution states, “These [Islamic] schools [of thought] enjoy official status in matters pertaining to. . . affairs of personal status (marriage, divorce,

81. TED STAHNKE & ROBERT C. BLITT, U.S. COMM’N ON INT’L RELIGIOUS FREEDOM (USCIRF), *THE RELIGION-STATE RELATIONSHIP AND THE RIGHT TO FREEDOM OF RELIGION OR BELIEF: A COMPARATIVE TEXTUAL ANALYSIS OF THE CONSTITUTIONS OF PREDOMINANTLY MUSLIM COUNTRIES* 14 and n.37 (2005), available at http://www.uscifr.gov/countries/global/comparative_constitutions/03082005/Study0305.pdf.

82. USCIRF Report, *supra* note 76 (stating that Article 2 “contains promising language regarding the right to freedom of religion with respect to belief and practice” and that Article 42 is a “positive article reflecting international human rights guarantees”).

83. IRAQ CONST. art. 41.

84. See Stilt, *supra* note 45, at 731 (“Personal status law deals primarily with marriage, divorce, child custody, inheritance, and other family-related matters; historically, it has been the area of law regulated by the state that is most closely tied to Sharia and most resistant to secularization.”).

85. JORDAN CONST. art. 105.

86. MALAY. CONST. Ninth Schedule, List II.

87. GAM. CONST. art. 7.

88. BAHR. CONST. art. 5(d).

inheritance, and wills) and related litigation in courts of law.”⁸⁹ Further, the constitutions of Sierra Leone and The Gambia permit exceptions from equal treatment rules in areas relating to personal status.⁹⁰

2. *History of Personal Status in Iraq*

Given that personal status as a Muslim is commonly governed by Sharia law, why was this issue such a lightning rod for disagreement during Iraqi constitutional negotiations? Iraq's legal history helps explain the tension. Iraq's 1925 constitution established two sets of religious courts: Sharia courts and “spiritual councils of the communities.”⁹¹ Article 76 of that constitution gave Sharia courts exclusive jurisdiction over matters or disputes relating to the personal status of Muslims and the administration of *waqfs*.⁹² Within Sharia courts, justice was to be administered in accordance with the terms of the Sharia doctrine particular to each of the Islamic sects.⁹³ The spiritual councils were competent to adjudicate issues of personal status for Jews and Christians.⁹⁴ Most subsequent Iraqi constitutions, however, did not speak to the issue of personal status.⁹⁵ The 1970 “interim constitution” has only one provision touching on a personal status issue: “Inheritance is a guaranteed right, regulated by the law.”⁹⁶

The law to which the 1970 constitution referred was most likely Iraq's 1959 personal status law.⁹⁷ That law, No. 188, which has been amended repeatedly, codified certain parts of Sharia law.⁹⁸ The law does not only rely on one sect's interpretation of Sharia; instead, it is an amalgam of provisions drawn from Sunni and Shia schools of Sharia, with a few additions that go beyond Sharia. For instance, the law provides for equal inheritance rights for sons and daughters.⁹⁹ Thus, the law is not a complete codifica-

89. IRAN CONST. art. 12.

90. GAM. CONST. arts. 33(2), 33(5)(c); SIERRA LEONE CONST. arts. 27(1), 27(4)(d).

91. IRAQ CONST. art. 75 (1925).

92. *Id.* art. 76.

93. *Id.* art. 77.

94. *Id.* arts. 78–79.

95. BROWN, *supra* note 48, at 2.

96. INTERIM IRAQ CONST. art. 17 (1970), available at <http://mallat.com/iraq%20const%201970.htm> (unofficial English translation).

97. Personal Status Law, Law No. 188 (1959) (Iraq) [hereinafter Law No. 188]. By its terms, Law No. 188 applies to all Iraqis “unless excluded therefrom by special Law.” *Id.* art. 2. Although one might expect this to mean “excluded by a subsequent law,” this provision apparently has been interpreted to include existing laws that established rules for the personal status of non-Muslims. Specifically, Proclamation No. 6 of 1917, issued by British Chief of Staff W.R. Marshall, provided that civil courts consult the religious authority of non-Muslim parties for its opinion to apply in the case. U.S. DEPT. OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT 2006: IRAQ (Sept. 15, 2006), available at <http://www.state.gov/g/drl/rls/irf/2006/71422.htm> [hereinafter INTERNATIONAL RELIGIOUS FREEDOM REPORT 2006: IRAQ].

98. See BROWN, *supra* note 48, at 5.

99. See, e.g., Law No. 188, *supra* note 97, art. 74. Article 74 provides that the Iraqi Civil Code rules on inheritance apply. *Id.* Articles 1188 and 1194 of the Civil Code expressly state that males and females will take equal inheritance shares. Civil Code arts. 1188, 1194 (1951) (Iraq), translated in 3 BUSINESS LAWS OF IRAQ 65 (Nicola H. Karam trans., 1990). See also BROWN, *supra* note 48, at 5.

tion of the Sharia personal status law, although it establishes that Sharia is to be referred to where gap-filling is required.¹⁰⁰ Further, while the law may contain a few provisions that go further in the direction of women's equality than Sharia does, the law consists almost entirely of codified Sharia rules, some of which are directly in conflict with equality between men and women.¹⁰¹

Despite the fact that the 1959 personal status law, as amended, is not substantively radical in its approach to personal status issues, a number of groups in Iraq view it as threatening. One of the primary criticisms of the law has been that it subjects adherents to the Sunni sect to various Shiite interpretations of law, and vice versa.¹⁰² Another criticism we heard negotiators levy against it is that, in those areas in which it goes further in the direction of equality than Sharia does, it is inconsistent with Sharia.¹⁰³ These criticisms likely account for an attempt by the Iraqi Governing Council (IGC), a legislative body under the Coalition Provisional Authority (CPA) whose acts were subject to the review of the CPA Administrator, to invalidate the law in December 2003.¹⁰⁴ The IGC adopted a resolution "that would apply the Islamic Sharia to all matters of family law in Iraq—including marriage, divorce, custody, wills, and inheritance—according to the individual's specific religious affiliation within Islam. . . [and] also declared invalid all previous laws, decisions, and directions regarding fam-

100. Law No. 188, *supra* note 97, art. 1(2).

101. See generally Law No. 188, *supra* note 97. For instance, Article 17 permits a Muslim man to marry a non-Muslim woman but prohibits a Muslim woman from marrying a non-Muslim man. Although this provision also illustrates discrimination against both women and men on the basis of religion, it nevertheless promotes sex discrimination by giving fewer rights to Muslim women than to Muslim men. In addition, Law No. 188 upholds certain inequalities in the area of divorce, despite other advances in this area. Article 37, for example, gives the husband the right to unilaterally divorce his wife but requires the wife to seek a judicial order of separation from her husband. Another example of gender inequality is Article 3, which endorses polygamy under certain conditions.

102. See NATHAN J. BROWN, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, THE FINAL DRAFT OF THE IRAQI CONSTITUTION: ANALYSIS AND COMMENTARY 6 (2005), <http://www.carnegieendowment.org/files/FinalDraftSept16.pdf> ("Shiite religious parties objected that the 1959 law did not allow their own community to practice Shiite law; they also found the transfer of authority from religiously trained judges to secular judges tantamount to a state takeover of religious interpretation.").

103. BROWN, *supra* note 48, at 5 (noting that Law No. 188 generally contained plausible interpretations of Islamic law but occasionally "burst past the limits of any established interpretation").

104. *Id.* at 6. The CPA was the authority established in May 2003 by the U.S.-led coalition to manage the occupation of Iraq and exercise temporary powers of government. CPA Regulation No. 1, § 1 (May 16, 2003), available at http://www.cpa-iraq.org/regulations/20030516_CPAREG_1_The_Coalition_Provisional_Authority_.pdf. That regulation provided that the CPA was vested with all executive, legislative, and judicial authority necessary to achieve its objectives, and that the CPA Administrator would exercise that authority. *Id.* Although the CPA therefore was the final authority over laws and regulations in Iraq, CPA Regulation No. 6 created the Iraqi Governing Council and stated that the CPA would work cooperatively with the IGC. CPA Regulation No. 6, *Governing Council of Iraq* (July 13, 2004), available at http://www.iraqcoalition.org/regulations/20030713_CPAREG_6_Governing_Council_of_Iraq_.pdf.

ily law that contravene Islamic law.”¹⁰⁵ The CPA Administrator declined to approve the resolution, and Law No. 188 remained in force, as it had for the previous forty-four years.¹⁰⁶

3. *Constitutional Negotiations on Personal Status*

The IGC's effort in December 2003 was a precursor to the fight that was to ensue over this provision during constitutional negotiations. From the beginning, the Kurds objected to the inclusion of a provision on personal status, while the Shia insisted on a provision that would have permitted the use of Sharia courts to resolve personal status issues in accordance with the rules of one's sect. The earliest draft of the personal status provision appeared in the July 20 version of the text, stating: “The law shall regulate civil affairs of Muslims and others in accordance with their religion and personal sect.”¹⁰⁷ This provision suggests the direction the Shia were heading: toward insisting on separate status courts for different sects of Islam. The Shia, in support of their position, argued that without a provision ensuring that an individual could use the personal status law of his or her sect, decisions about personal status would be inappropriately imposed on the individual. However, there was another reason the Shia would have wanted to include such a clause: omitting such a clause would have ensured the continuation of the entire 1959 personal status law, which gave greater rights to women in certain limited areas. To the extent that the Shia were uncomfortable with these greater rights, a constitutional clause on personal status would trump Law No. 188 to the extent the two laws were inconsistent.¹⁰⁸

On July 30, the Chairman's draft Article 19 stated, “Followers of each religion or sect are free in their commitment in their personal status according to their religious and sectarian beliefs. The law shall regulate this.”¹⁰⁹ This version contains the main elements of the final language, with one key exception: it did not contemplate what would happen to those Iraqis who were not religious, or who wished to have their cases adjudicated in accordance with civil law.¹¹⁰ After some negotiators made that point to the Chairman, he suggested that it would be acceptable to add a clause indicating that individuals may choose to have their cases adjudicated under Iraqi civil law. A Kurd negotiator suggested, “Followers of every religion and sect are free in their personal status.” Another negotiator suggested, “Iraqis, including people of religion and others, are free in their personal beliefs.” Neither proposal received support.

On August 15, the day the draft was to be finished, much of the discussion focused on this provision. Some negotiators argued that any such provision should take into account that some Iraqis may wish to continue

105. Stilt, *supra* note 45, at 710.

106. *Id.*

107. IRAQ CONST. § 2, art. 14 (July 20, 2005 draft).

108. *Id.* arts. 13, 130.

109. IRAQ CONST. § 2, art. 19 (July 30, 2005 draft).

110. *See id.*

to use the 1959 law as the governing law, and that any text dealing with personal status should retain an express civil law option. To that end, one proposal would have spelled out that each individual was free to select the civil or religious personal status law that would apply to him or her, and that the state was required to provide a civil law option.

By August 17, agreement was still elusive. Shia negotiators continued to insist on a reference to "sect," and to balk at an express reference to civil law. Kurdish negotiators continued to seek to have the provision removed, and the Iraqiyya List—a group of secular candidates who had run for and won seats in the TNA, led by Iyad Allawi and his Iraqi National Accord party—wanted an explicit civil law option. The suggested Shia compromise, which gave a nod to the Shia interest in "sect" and the Kurds' interest in "choices," was: "All Iraqis are free in their commitment to their personal status in accordance with their beliefs, sects, or choices, and this will be regulated by law." Although this ended up being very close to the final language, it was not accepted immediately. As late as August 25, the Kurds pushed for the provision's removal, but ultimately relented.¹¹¹

4. *Effect of Constitution on Law No. 188*

A number of questions flow from the final language, particularly because the final text did not explicitly require the government to preserve a civil law option.¹¹² What happens when two parties to a dispute—perhaps a husband and wife seeking a divorce, or two siblings fighting about an inheritance—want their dispute to be covered by different laws? What if a man's daughter wants to rely on the current personal status law to argue that she is entitled to half of her father's estate, and the man's son wants to rely on a Shia interpretation of Sharia to argue that he is entitled to twice as much as his sister?¹¹³ Both can point to the personal status provision in the constitution to defend their arguments.

Part of the final text offers both a possible solution and additional questions. The fact that the subject matter is to be regulated by law could mean one of two things. It could mean that a subsequent law will further define the constitutional right, and in doing so answer some of the conflicts of law questions that are bound to arise from the current text. It might also mean, however, that the state's obligation to respect Iraqis' "choices" must be fulfilled by providing a civil personal status law, such that those opting for a civil option have a viable "choice." Iraqi legislators therefore will need to decide whether Law No. 188 remains in force without change per Article 130, which provides that existing laws shall remain

111. One possible explanation for the Kurds' eventual concession is that, although they did not like the provision, they felt they had achieved much of the autonomy they desired, including language in the draft that arguably would permit the KRG to establish its own personal status code. Thus, there no longer was a need to bargain intensely over the constitutional personal status provision.

112. See IRAQ CONST. art. 41.

113. Stilt, *supra* note 45, at 750 (explaining Sharia's and Law No. 188's approaches to inheritance).

in force, unless annulled or amended in accordance with the constitution,¹¹⁴ or whether anything in Article 41 inherently contradicts Law No. 188, such that that Law (or, more likely, only parts of it) might be deemed invalid.¹¹⁵ Perhaps Article 2 of Law No. 188, which states that it will apply to all Iraqis other than those excluded therefrom by a special law,¹¹⁶ will need to be amended to reflect that the Law will apply only to those Iraqis who choose to utilize it. Legislators might consider making the Law the default law for personal status disputes, particularly where parties to the dispute cannot agree on which source of personal status law to use. Given how vigorously this provision was fought during constitutional negotiations, future legislation in this area is almost certain to prompt similarly heated debates with real world consequences, and observers should not be surprised to see a greater reliance on sectarian courts to resolve personal status issues.

II. De-Ba'athification

A. Background

De-Ba'athification has its roots in the defeat of Saddam Hussein. Hussein headed the Arab Socialist Ba'ath Party in Iraq, which embraced a secular, socialist, pan-Arab nationalism.¹¹⁷ During the first decade of its rule in Iraq, the Ba'ath Party expanded its political power through a well-organized, tightly controlled party apparatus, a growing bureaucracy, and an efficient secret police operation.¹¹⁸ When Hussein became President of Iraq in 1979, he used the Ba'ath Party as a tool by which to retain absolute power in Iraq; virtually everyone who held a senior position in the government was a member of the Party.¹¹⁹

Given the relationship between Hussein and the Ba'ath Party that had developed during his rule, there was a strong interest in dismantling the Ba'ath Party structure during the U.S. occupation of Iraq, as evidenced by a number of early de-Ba'athification promulgations by the CPA (some of which the CPA rescinded during the occupation).¹²⁰ The CPA's first Order, in fact, "eliminate[ed] the Party's structures and remov[ed] its lead-

114. IRAQ CONST. art. 130.

115. *Id.* art. 13(second) ("No law that contradicts this Constitution shall be enacted. . . . [A]ny other legal text that contradicts this Constitution shall be considered void.").

116. Law No. 188, *supra* note 97, art. 2.

117. PHEBE MARR, *THE MODERN HISTORY OF IRAQ* 77 (2004).

118. *Id.* at 139-140.

119. *Id.* at 177; see also ANTHONY H. CORDESMAN & AHMED S. HASHIM, *IRAQ: SANCTIONS AND BEYOND* 39 (1997) (describing the Ba'ath Party as a tool for selecting careerists and obliging technocrats).

120. See, e.g., CPA Order No. 1, *De-Ba'athification of Iraqi Society* (May 16, 2003), available at http://www.iraqcoalition.org/regulations/20030516_CPAORD_1_De-Ba_athification_of_Iraqi_Society_.pdf; CPA Order No. 100, *Transition of Laws, Regulations, Orders, and Directives Issued by the Coalition Provisional Authority*, § 6(1) (June 28, 2004), available at http://www.iraqcoalition.org/regulations/20040628_CPAORD_100_Transition_of_Laws_Regulations_Orders_and_Directives.pdf.

ership from positions of authority and responsibility in Iraqi society.”¹²¹ CPA Memorandum No. 1 then implemented that Order, describing the process by which U.S. forces would identify Ba’ath Party members.¹²² CPA Order No. 5, before its rescission, created an Iraqi De-Ba’athification Council to identify Ba’ath Party property and assets, identify and locate former Ba’ath Party officials involved in human rights violations, and advise the CPA Administrator on effectively dismantling the structure of the Party.¹²³ Finally, CPA Memorandum No. 7 rescinded Order No. 5 and delegated to the Iraqi Governing Council (IGC) the authority to carry out de-Ba’athification consistent with Order No. 1, also providing that the IGC may further delegate such authority to the Higher National De-Ba’athification Commission (NDC) or other organization that the IGC establishes.¹²⁴

B. Ba’ath Party Ban and the De-Ba’athification Process

Against this background, it is not surprising that questions about de-Ba’athification arose during constitutional negotiations. The constitution, both in its ratified form and in its early drafts, contained two provisions concerning de-Ba’athification—a provision that became Article 7(first), which attempted to proscribe manifestations of the Iraqi Ba’ath Party ideology, and another provision that became Article 135, which recognized the continued existence of the NDC and set forth the conditions for its termination.¹²⁵ Both provisions were the subject of intense negotiation and dispute until almost the day of the constitutional referendum itself. Although the Sunnis did not play a great role during the August negotiations, the U.S. Government, aware of Sunni concerns on the issue, encouraged the Shia Alliance to narrow the scope of both provisions. Later, when Sunni groups took a more active role in the negotiations, they struggled with the Shia Alliance to further weaken the effect that these provisions could have

121. CPA Order No. 1, *supra* note 120, ¶ 1.

122. CPA Memorandum No. 1, *Implementation of De-Ba’athification Order No. 1* (June 3, 2003), available at http://www.iraqcoalition.org/regulations/20030603_CPAMEMO_1_Implementation_of_De-Ba_athification.pdf (stipulating that Iraqis eventually would take over the de-Ba’athification process). Note, however, CPA Order No. 100 rescinded this Memorandum in its entirety. CPA Order No. 100, *supra* note 120, § 6(1).

123. CPA Order No. 5, *Establishment of the Iraqi De-Baathification Council*, §§ 1, 3 (May 25, 2003), available at <http://www.iraqcoalition.org/regulations/CPAORD5.pdf>.

124. CPA Memorandum No. 7, *Delegation of Authority Under De-Baathification Order No. 1*, §§ 1(1), 2(1), 3 (Nov. 4, 2003), available at http://www.iraqcoalition.org/regulations/20031104_CPAMEMO_7_Delegation_of_Authority.pdf. The NDC subsequently issued its own set of de-Ba’athification procedures. See NAT’L DE-BA’ATHIFICATION COMM’N, THE HIGHER NATIONAL DE-BA’ATHIFICATION COMMISSION PROCEDURES OF DE-BA’ATHIFICATION IN THE PUBLIC SECTOR IN IRAQ (translation on file with the authors). To date, the Iraqi government has established no other organization to replace the NDC.

125. Compare IRAQ CONST. § 1, art. 11; § 6, art. 3 (July 22, 2005 draft) (prohibiting thinking that adopts radicalism, terrorism, and labeling others as infidels and setting forth the conditions for the termination of the NDC), with IRAQ CONST. arts. 7, 135 (prohibiting any entity or program that adopts, incites, glorifies, promotes, or justifies racism or terrorism or accusations of being an infidel and setting forth the framework for the NDC and its dissolution).

on former Ba'ath Party members. The resulting final provisions responded in limited ways to Sunni concerns that the de-Ba'athification program unfairly targeted Sunnis whose ties to the Ba'ath Party had been superficial, if not non-existent, but largely reinforced the Shia Alliance position that the government should continue to pursue a robust de-Ba'athification of Iraqi society.

The July 22 draft flatly outlawed both thought and practice relating to the Ba'ath Party under Saddam Hussein.¹²⁶ It stated, "Any thinking that adopts radicalism, terrorism, *taqfir* (labeling others as infidels), or incites, glorifies, initiates or promotes thereto, especially the Saddamist Ba'ath, shall be prohibited in thought and in practice under any name."¹²⁷ The focus on thought in this provision reflected a desire to eradicate all Ba'ath Party support, whether or not actualized in conduct. The second provision relating to de-Ba'athification in the July 22 draft provided that the NDC would continue its work as an independent commission, be subject to termination only "with the conclusion of its mission," and with two-thirds majority approval by the new legislature.¹²⁸ Thus, this provision buttressed the independence and continued existence of the NDC by setting a relatively high bar for dissolving a Commission that, even at the time of drafting, had come under intense criticism. Overall, both provisions reflected the anti-Ba'ath sentiments of the Shia-led TNA Constitutional Committee.

Negotiators proposed some significant changes to these provisions between July 22 and the second week of August. During this period, the Constitutional Committee first suggested casting the net of the Ba'ath ideology provision even wider by expressly prohibiting the thought and practice of the Ba'ath Party in general, rather than just the "Saddamist Ba'ath," which was viewed by some negotiators as a narrower category of Ba'ath Party affiliation.¹²⁹ Subsequent iterations of the draft reflected the struggle between those who were unabashed in their effort to punish all Ba'athists and those who hoped to moderate the language by distinguishing the Ba'ath Party generally from the particularly virulent strain developed by Saddam Hussein, and thereby win greater Sunni support for the document. By August 8, the Constitutional Committee had arguably also made it more difficult to dissolve the NDC by expressly conditioning termination of the Commission's work "upon a request by the Commission and with a two-thirds majority vote of [the legislature's] members."¹³⁰

The draft version of Article 7(first) was subject to several criticisms. First, by banning practice *and* thought, the provision appeared legally to proscribe some level of thought short of that which resulted in action. This language, therefore, created a capacious standard, which the government

126. IRAQ CONST. § 1, art. 11 (July 22, 2005 draft).

127. *Id.*

128. *Id.* § 6, art. 3.

129. The Constitutional Committee also added that the prohibition on thought and practice would be regulated by law, a clause that remained through the final draft.

130. IRAQ CONST. § 7, art. 4(second) (Aug. 8, 2005 draft).

might use to prosecute individuals who, in the opinion of one or more government officials, held unpopular political views, whether or not those individuals ever acted on their views. In addition, the provision arguably created some tension with the fundamental rights to privacy and expression. Every constitution contains inherent tensions among its provisions, and the Iraqi constitution's guarantees of privacy and expression are already limited to some extent by considerations of public morality and order.¹³¹ Nevertheless, a ban on certain types of thought could have allowed a level of intrusion that violated even these qualified fundamental rights.

The second objection to the draft version of Article 7(first) was political. A provision that specifically named the Ba'ath Party or Saddam's strain of Ba'athism would further exacerbate fears among Sunnis that they were being marginalized and unjustly punished by the current government. In the ITG's short tenure, there were growing concerns that the NDC was engaging in political witch-hunts or had failed to provide proper due process to targeted individuals.¹³² Because Sunnis were the primary targets of the de-Ba'athification process and one of the primary supporters of the insurgency, a provision that further marginalized this group threatened to make it even more difficult for Sunni leaders to support the constitution.¹³³

Post-World War II Germany provided a historical precedent for excluding from the foundational law a ban on particular political parties. Article 21 of the German constitution made unconstitutional "parties which, by reason of their aims or the behavior of their adherents, seek or impair or destroy the free democratic basic order or to endanger the existence of the Federal Republic of Germany" and made the Federal Constitutional Court the arbiter of whether a particular party was subject to this prohibition.¹³⁴ Unlike Article 7(first) of the Iraqi constitution, the German provision targeted a general category of political parties that sought the same objectives as the Nazi Party, without ever using the Nazi Party's name or expressly banning Nazi ideology. On this basis, the U.S. Government noted to the drafters that the provision drafted by the TNA Constitutional Committee, without any reference to "thought," the Ba'ath Party, or the "Saddamist Ba'ath," could still prohibit the Ba'ath Party and parties with similar aims. In addition, future legislation could prohibit the Saddamist

131. See IRAQ CONST. arts. 2, 17, 38.

132. See, e.g., Walid Hussein, *On De-Ba'athification*, AL DAWA NEWSPAPER, Sept. 8, 2005 (commenting that in the de-Ba'athification process some people were fired from their positions and were victimized because of differences of opinion, or personal interest, or because of an incomplete investigation by the de-Ba'athification Committee).

133. At this stage, the draft constitution contained an absolute prohibition on collective punishment, thereby providing theoretical legal protections to the Sunnis from punishment based entirely on their sect. Given Sunni concerns that the de-Ba'athification process already was divorced from the rule of law, however, a generally-stated legal protection like the provision that became Article 19(eighth) likely would have been inadequate to allay their fears. See IRAQ CONST. art. 19(eighth) ("Punishment shall be personal.").

134. GRUNDGESETZ [GG] [Constitution] art. 21 (F.R.G.).

Ba'ath, if necessary.¹³⁵ Alternatively, like the German constitution, the negotiators could have assigned to the Federal Supreme Court the task of deciding whether a particular entity or political movement was prohibited.

Perhaps the biggest concern about including Article 135, describing the termination of the NDC, was that, like Article 7(first), it would further alienate the Sunni population. The German constitution again served as useful precedent because it made no express reference to the de-Nazification law or process. Instead, it stipulated that "legislation enacted for the 'Liberation of the German People from National Socialism and Militarism' is not affected by the provisions of this Constitution."¹³⁶ Thus, the German constitution appeared to recognize the validity of de-Nazification rules, along with other post-liberation legislation.¹³⁷ In the Iraqi context, the draft constitution validated all existing laws not in conflict with the constitution, including CPA Order No. 1 and Memorandum No. 7 on de-Ba'athification. Thus, the Iraqi constitution arguably already provided for the continued existence of the NDC. To the extent that drafters were worried that broad equality guarantees in the constitution would undercut the NDC's activities, they had Article 7(first) to fall back on, or, alternatively, could have structured a provision very similar to Article 139 of the German constitution, expressly validating post-liberation legislation notwithstanding provisions of the constitution.¹³⁸ However, the Shia Alliance continued to insist on including the NDC provision, most likely because the NDC provision as drafted would have made any legislative attempt to terminate the Commission's work more difficult by conditioning termination on a two-thirds majority vote and a request by the Commission itself.

In negotiations among the Kurdish Alliance and the secular Shia and Sunni groups between August 10 and August 15, without the participation of the full Shia Alliance, these groups showed a willingness to follow the German example. They removed all references to the Saddamist Ba'ath and the Ba'ath Party.¹³⁹ This bloc of negotiators also completely deleted the transitional provision on the NDC, instead relying on the constitutional provision recognizing the validity of existing laws, including those establishing and regulating the NDC.¹⁴⁰

The merging of divergent texts—the Shia-driven TNA Constitutional Committee draft and the leadership summit document—on and shortly after August 15 resulted in a re-emergence of the earlier Committee-drafted

135. Paragraph 200(2) of the Iraqi Penal Code already criminalized some of the activity that was the focus of Article 7(first). It imposed criminal punishment on "any person who . . . acclaims or promotes anything that stirs up factional or sectarian chauvinism or encourages conflict between factions and classes or stirs up feelings of hatred and contempt among the population." Law No. 111 (1969), *supra* note 39, para. 200(2).

136. GRUNDGESETZ [GG] [Constitution] art. 139 (F.R.G.).

137. See EARL F. ZIEMKE, *THE U.S. ARMY IN THE OCCUPATION OF GERMANY, 1944-1946*, at 386 (1990).

138. See IRAQ CONST. art. 7(first); GRUNDGESETZ [GG] [Constitution] art. 139 (F.R.G.).

139. Compare IRAQ CONST. § 1, art. 9 (Aug. 6, 2005 draft), with IRAQ CONST. § 1, art. 8 (Aug. 14, 2005 draft).

140. Compare IRAQ CONST. § 1, art. 9 (Aug. 6, 2005 draft), with IRAQ CONST. § 1, art. 8 (Aug. 14, 2005 draft).

de-Ba'athification provisions, with a few relatively minor modifications. In the August 17 draft, the Shia negotiators agreed to drop any reference to "thought" or "thinking," as well as the reference to the "Ba'ath Party;" however, they insisted on specifying the "Saddamist Ba'ath" in the provision. Thus, the provision banned only "entities" that under any name or structure adopted, incited, eased, glorified, promoted or justified racism, terrorism, sectarianism or *taqfir*, but expressly included the "Saddamist Ba'ath."¹⁴¹ With respect to the draft version of Article 135, the negotiators deviated slightly from earlier language by giving the legislature the "right to dissolve this Commission after the completion of its function by a two-thirds majority vote of its members."¹⁴² By deleting language that expressly conditioned the NDC's dissolution on an NDC request to the legislature, therefore, the negotiators arguably gave the legislature the exclusive role in deciding when the NDC's mission is complete.

The negotiators also added to the draft version of Article 135 a sub-provision requiring that those holding certain government positions not have been "subject to" the de-Ba'athification law.¹⁴³ Most translations of the final provision state that such officials "may not be subject to the provisions of de-Ba'athification."¹⁴⁴ Given the way in which this provision has been drafted and translated, there has been some confusion as to whether it actually granted these officials immunity from the de-Ba'athification process once elected, or was intended by the drafters to serve as a continuing prohibition on an individual from holding one of those public positions if that individual, as a former Ba'ath Party member, fell within one of the categories outlined in the de-Ba'athification provisions in Iraqi law. While there may be good reasons why elected officials should enjoy certain immunities during their tenure in office—for instance, to permit officials to serve the public without fear of frivolous lawsuits—such an immunity-granting reading would have effectively bestowed a benefit on former Ba'ath Party members if they succeeded in hiding such membership until elected. In addition, an immunity-granting reading would have been out of tune with the unwavering efforts of key negotiators to ensure that individuals subject to the de-Ba'athification law were prohibited from public employment.¹⁴⁵

The drafts that emerged in late August continued to reflect the battle over the scope and detail of the ban on the Ba'ath Party and the ease with

141. IRAQ CONST. § 1, art. 9 (Aug. 17, 2005 draft).

142. *Id.* § 7, art. 9(second).

143. *Id.* § 7, art. 9(third).

144. IRAQ CONST. art. 135. The final language in Article 135(3) stated:

A nominee to the positions of the President of the Republic, the Prime Minister, the members of the Council of Ministers, the Speaker, the members of the Council of Representatives, the President, members of the Federation Council, their counterparts in the regions, or members of the judicial commissions and other positions covered by de-Ba'athification statutes pursuant to the law may not be subject to the provisions of de-Ba'athification.

145. Professional translators, moreover, have assured that the provision is not meant to create immunity from the de-Ba'athification law for these office-holders.

which the legislature should be able to dissolve the NDC. On August 21 negotiators expanded the draft version of Article 7(first) to address “especially the former Ba’ath Party and its symbols.”¹⁴⁶ A day later, however, negotiators revised this provision expressly to single out the “Saddamist Ba’ath Party in Iraq and its symbols.”¹⁴⁷ Then on August 26, in a last-minute concession to the alienated Sunni camp, the negotiators agreed to strike the word “Party” after “Saddamist Ba’ath” in Article 7, and to reduce Article 135’s voting threshold for terminating the NDC from two-thirds to an absolute majority.¹⁴⁸ Neither of these changes resulted in Sunni support for the constitution at the time.

C. Late Additions

During the second week of October, in the final attempt to enlist Sunni support for the constitution in the referendum, Iraqi leaders added several provisions to the document, including two related to the de-Ba’athification process. Article 135(fifth) states: “Mere membership in the dissolved Ba’ath Party shall not be considered a sufficient basis for referral to court, and a member shall enjoy equality before the law and protection unless covered by the provisions of de-Ba’athification and the directives issued according to it.”¹⁴⁹ Article 135(sixth) provides that the COR shall establish a parliamentary committee to “monitor and review the executive procedures” of the NDC to ensure they meet the goals of “justice, objectivity, and transparency” and are consistent with relevant laws.¹⁵⁰

Article 135(fifth) was intended to signal to former rank-and-file Ba’ath Party members who were not subject to the de-Ba’athification law and who had not otherwise engaged in any criminal activity that the new government would not prosecute them under the constitution or implementing legislation merely because of such membership.¹⁵¹ The difficulty with drafting such a provision was two-fold. First, the provision was added in response to a political problem, rather than a legal void, and therefore created protections for lower-ranking members that already existed elsewhere in the document. For example, because Article 14 already guaranteed equality before the law and prohibited discrimination on the basis of “belief or opinion,” among other categories, it was unnecessary to affirm the general legal equality of Ba’ath Party members not subject to the de-Ba’athification law.¹⁵² In addition, Article 19(second) already prohibited criminal prosecution or punishment unless provided for by law,¹⁵³ and neither the de-Ba’athification laws nor any other Iraqi law provided for criminal punishment based only on former party membership. Indeed,

146. IRAQ CONST. § 1, art. 7 (Aug. 21, 2005 draft).

147. IRAQ CONST. § 1, art. 7(first) (Aug. 22, 2005 draft) (emphasis added).

148. See IRAQ CONST. § 1, art. 7(first) (Aug. 26, 2005 draft); *Id.* § 6, art. 146(second); IRAQ CONST. § 1, art. 7(first) (Aug. 27, 2005 draft); *Id.* § 6, art. 132(second).

149. See IRAQ CONST. art. 135(fifth).

150. *Id.* art. 135(sixth).

151. See *id.* art. 135(fifth).

152. *Id.* art. 14.

153. *Id.* art. 19(second).

CPA Order No. 1 distinguished clearly between the loss of employment in the public sector, to which some former Ba'ath members would be subjected, and the imposition of criminal penalties, which required investigation and, presumably, due process before punishment was imposed.¹⁵⁴ Moreover, even if a law providing for criminal prosecution based merely on former Ba'ath Party membership were enacted, it presumably would be deemed unconstitutional, based on Article 19(second) of the new constitution, to the extent such a law would conflict with the prohibition on imposing retroactive criminal punishment.¹⁵⁵

The second difficulty Article 135(fifth) presented was that by affirming the equality of lower-ranking members in contradistinction to higher-ranking members, it created the inference that the higher-ranking members did not necessarily enjoy those same rights.¹⁵⁶ Indeed, to the extent that the more specific provision in Article 135(fifth) overrode the more general provisions of Articles 14 and 19(second) as a matter of constitutional interpretation, Article 135(fifth) suggested that those covered by the de-Ba'athification law actually could be denied the constitutionally-based equal protection of the laws or could be criminally prosecuted solely on the basis of their former party membership. Thus, those covered by the de-Ba'athification law would be subject to any official discrimination or prosecution the government devised. Despite the implications of the plain language, however, the negotiators included this provision in the context of responding specifically to actual or perceived abuses of the de-Ba'athification process, and did so to clarify that most former Ba'ath Party members would receive fair and equal treatment.¹⁵⁷

The purpose of Article 135(sixth) was to enable the new legislature, which would have more robust Sunni participation, to affect the conduct of

154. CPA Order No. 1, *supra* note 120, § 1(2)-(3).

155. IRAQ CONST. art. 19(second) ("[P]unishment shall only be for an act that the law considers a crime when perpetrated.").

156. See *id.* art. 135(fifth).

157. It is not clear whether the provision ultimately will serve its political purpose. Specifically, all fourth-tier "Group" members—as well as fifth- and sixth-tier party members who held high public sector positions—are included in CPA Order No. 1's lifetime ban from public employment. See CPA Order No. 1, *supra* note 120, § 1(2). Of course, the top three tiers of the Ba'ath Party ("Regional Command Member," "Branch Member," and "Section Member") were also covered by that ban. *Id.* However, even the NDC recognizes that many fourth- through sixth-tier members do not pose a continuing threat to Iraqi society, as it has granted numerous exceptions to the de-Ba'athification law to those former Ba'ath Party members. See John Lee Anderson, *Out on the Street*, NEW YORKER, Nov. 15, 2004, available at http://www.newyorker.com/printables/fact/041115fa_fact (reporting that the NDC claimed that, as of 2004, it had granted about half of the applications for exceptions from fourth tier Ba'ath Party members). Nevertheless, because these individuals are still subject to de-Ba'athification procedures, they arguably are still "covered by the provisions of de-Ba'athification," and thus excluded from the equality-affirming clause of Article 135(fifth). See IRAQ CONST. § 6, art. 135(fifth). Thus, former fifth- and sixth-tier Ba'ath Party members—individuals who were relatively low-ranked within the Party—arguably may feel further marginalized by Article 135(fifth). By establishing two categories—one that expressly enjoys equality and one that implicitly does not—this provision may aggravate the perceptions of persecution felt by these former members of the Ba'ath Party.

the NDC. Although the provision indicates that the COR committee will “monitor and review” the NDC,¹⁵⁸ it is not clear exactly how that task will be read in conjunction with other sub-provisions of Article 135. In particular, Article 135(first) already articulates a somewhat vague relationship between the NDC and the other branches of government, reiterating that the Commission is “independent,” but that it should accomplish its functions “in coordination with the judicial authority and the executive institutions within the framework of the laws regulating its functions. . . [and] shall be attached to the Council of Representatives.”¹⁵⁹ Giving the COR the power to monitor and review the NDC’s actions to determine their conformity with established laws would appear to undercut even further the independence recognized earlier in the provision. Making the NDC slightly more accountable to the legislature by way of the COR committee, however, seems to comport with the desire of the drafters to elicit Sunni support by giving them some ability to impact the NDC once they are elected to the COR.

In sum, the Sunnis (with support from the U.S. Government and others defending Sunni interests) were able to convince the Shia Alliance to limit Article 7(first)’s prohibition to “entit[ies] or program[s]” that adopt or promote certain destructive goals and to the “Saddamist Ba’ath,” from the much broader bans on “thinking” and the “Ba’ath Party” generally.¹⁶⁰ Likewise, the Sunnis persuaded the Shia Alliance to allow greater oversight of the National De-Ba’athification Commission in Article 135 than the Shia Alliance would have preferred. However, the Alliance still managed to meet its substantive objectives through these more narrow provisions, by singling out former Ba’athists and reminding them of the continuing prohibition on their activity and of the possibility of future government action to ensure that the Ba’ath Party remains defunct.

III. Iraq’s International Obligations

Many constitutions, particularly more recent ones, contain provisions that define how a country approaches its international obligations.¹⁶¹ Some of these provisions simply identify the procedures by which a state may negotiate, conclude, and ratify treaties, sometimes assigning distinct roles to different branches of government.¹⁶² Another category of substantive provisions affirms that a country will comply with its international obligations.¹⁶³ In yet other cases, constitutions will detail the interplay

158. See IRAQ CONST. art. 135(sixth).

159. See *id.* art. 135(first).

160. Compare IRAQ CONST. art. 7(first), with IRAQ CONST. § 1, art. 9 (Aug. 6, 2005 draft), and IRAQ CONST. § 1, art. 7 (Aug. 21, 2005 draft).

161. See, e.g., CROAT. CONST. art. 140; FR. CONST. arts. 54-55; NAMIB. CONST. art. 143; S. AFR. CONST. arts. 231-33.

162. See, e.g., FR. CONST. art. 54; HAIT. CONST. art. 276; NETH. CONST. art. 91(1-2); S. AFR. CONST. art. 231.

163. NAMIB. CONST. art. 143 (“All existing international agreements binding upon Namibia shall remain in force, unless and until the National Assembly otherwise decides.”); POL. CONST. art. 9 (stating that Poland shall respect international law binding

between treaties and domestic law;¹⁶⁴ some go so far as to establish rules of statutory interpretation that encourage consistency with international law.¹⁶⁵ These types of substantive provisions serve several purposes: they can make clear that a country intends its existing treaty obligations to continue to apply under a newly drafted constitution; they can serve as a political signal to the international community that a country intends to honor its international obligations, above and beyond the requirements imposed by international law; they can clarify for the country's judiciary how to apply treaty law in relation to statutes; and they can incorporate into a country's constitution substantive provisions and rights contained in existing treaties.

Iraq's constitution contains a few references to its international obligations and to how its treaty negotiation and ratification processes will work. Of particular note are Article 8, under which Iraq shall respect its international obligations, and a provision, ultimately excised from the text, that would have given individuals the rights contained in international human rights agreements to which Iraq is a party as long as those rights did not contradict the provisions of the constitution.¹⁶⁶

A. Article 8

Article 8 of the constitution provides, "Iraq shall observe the principles of good neighborliness, adhere to the principle of non-interference in the internal affairs of other states, seek to settle disputes by peaceful means, establish relations on the basis of mutual interests and reciprocity, and respect its international obligations."¹⁶⁷

This provision began in a slightly different and, in the view of some, more problematic form. The July 22 draft stated, "The State of Iraq is committed to international treaties that do not contradict the provisions of this

on it); SWITZ. CONST. art. 190 (stating that the Federal Supreme Court shall follow international law).

164. CROAT. CONST. art. 140 (prioritizing international agreements over domestic law "in terms of legal effects" and providing that treaty provisions may only be changed or repealed by their terms or in accordance with international law); FR. CONST. art. 55 (providing that duly ratified treaties or agreements shall override domestic law if the treaty is applied by other treaty parties); NETH. CONST. art. 44 (statutory provisions that conflict with treaties of general applicability cannot be applied); SLOVN. CONST. art. 153 (laws must be consistent with generally applicable principles of international law and with treaty obligations); GRUNDGESETZ [GG] [Constitution] art. 25 (F.R.G.) ("The general rules of public international law form part of the Federal law. They take precedence over the laws and directly create rights and duties for the inhabitants of the Federal territory.").

165. Article 233 of South Africa's constitution memorializes the same principle explicated in the U.S. case of *Charming Betsy*—its courts must prefer a reasonable interpretation of a statute that is consistent with international law over one that is not. See *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804). The South African constitution also is notable for incorporating customary international law as the law of the Republic unless it is inconsistent with the constitution or an act of Parliament. S. AFR. CONST. art. 232. Namibia's 1990 constitution does the same at Article 144. NAMIB. CONST. art. 144.

166. IRAQ CONST. art. 8; IRAQ CONST. § 1, art. 13 (July 22, 2005 draft).

167. IRAQ CONST. art. 8.

Constitution.”¹⁶⁸ The Kurdish constitutional proposals, published in the *Al Taakhi* newspaper on July 28, contained a provision stating, “Internal and external relations of the federal Iraqi State shall be based on the principles of peace, cooperation, and mutual interests.”¹⁶⁹ By August 6, these concepts had merged into what became the final language, except that the draft still contained the caveat that Iraq would comply with its agreements “in a way that does not contradict the provisions of this Constitution.”¹⁷⁰

This caveat was of concern to some negotiators, to the United States, and to others in the international community, because it made clear Iraq’s intention to make its pre-existing treaty commitments subject to the contents of its new constitution.¹⁷¹ Although Iraq is not a party to the Vienna Convention on the Law of Treaties (Vienna Convention), many view the Vienna Convention as now representing customary international law.¹⁷² The Vienna Convention sets forth how a State may exclude or modify the legal effect of a given treaty provision by taking a reservation to a treaty. The Vienna Convention defines “reservation” as “a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.”¹⁷³ This makes clear that reservations, if taken, must be taken at the time that a State decides to become a party to a treaty; a State cannot take a reservation after it already has become a party unless

168. IRAQ CONST. § 1, art. 13 (July 22, 2005 draft).

169. IRAQ CONST. ch. 1, art. 12 (July 28, 2005 KRG draft). The Kurdish proposal contained an unusual clause that attempted to lodge certain provisions of Iraq’s constitution within the jurisdiction of the UN Security Council. That clause stated:

The federal government of Iraq will commit itself, in front of the United Nations General Assembly, in guaranteeing the rights, borders, and authorities provided for in this constitution; and also to commit to safeguard the federal, democratic, and pluralistic system, in accordance with this constitution; and to respect its principles. Any violation of the provisions of this article will be considered to be a threat to international peace and security. To this end, a copy of this constitution will be kept at the UN Secretariat General.

Id. ch. 5, art. 82. While the provision did not enjoy any support, it is notable as an illustration of the Kurds’ interest in securing the Iraqi government’s adherence to certain constitutional protections not only through the constitution itself, but also through the oversight of the international community.

170. IRAQ CONST. § 1, art. 10 (Aug. 6, 2005 draft).

171. Letter from Janet Walsh, Acting Director, Women’s Right Division of Human Rights Watch, to Humam Hamoudi, Chair, Constitutional Drafting Committee in Iraq (July 28, 2005), available at <http://hrw.org/english/docs/2005/07/25/iraq11445.htm>.

172. See, e.g., Christine Bell, *Peace Agreements: Their Nature and Legal Status*, 100 AM. J. INT’L L. 373, 379 (2006) (stating that much of the Vienna Convention is “accepted as restating customary international law”); Joshua D. Reader, *The Case Against China: Establishing International Liability for China’s Response to the 2002-2003 SARS Epidemic*, 19 COLUM. J. ASIAN L. 519, 571 n.155 (2006) (Vienna Convention is an “international agreement representing a codification of preexisting customary international law”); Tobias Thienel, *Foreign Acts of Torture and the Admissibility of Evidence*, 4 J. INT’L CRIM. JUST. 401, 409 n.36 (2006) (Vienna Convention “codified customary international law”).

173. Vienna Convention on the Law of Treaties art. 2(d), opened for signature May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1970) [hereinafter Vienna Convention].

the treaty provides otherwise. Further, the Vienna Convention makes clear that a State Party to a treaty may not invoke the provisions of its internal law—which would include its constitutional provisions—as justification for its failure to perform a treaty.¹⁷⁴

Given these provisions of customary international law, the United States discussed with negotiators the general view that it was impermissible to limit one's existing treaty obligations unilaterally, even if done via a constitution. Iraq may, of course, take reservations in accordance with the rules set forth in the Vienna Convention when it signs, ratifies, accepts, approves, or accedes to a treaty. However, if Iraq has become party to a treaty and has not taken a reservation, then Iraq is bound by the entire treaty, and cannot limit its treaty obligations unilaterally. To the extent that there is a provision in a treaty to which Iraq is a party that, in Iraq's view, conflicts with its new constitution, Iraq may withdraw from the treaty and re-accede with an appropriate reservation.¹⁷⁵

It appears that negotiators were concerned about affirming their commitment to one bilateral treaty in particular, not about affirming Iraq's commitment to its international obligations in general. After the negotiators worked with variations on the language to see if it was feasible to draft the provision in a way that committed Iraq to all but that one treaty, they seemed to conclude that it was preferable not to include an exception. Thus, the final language requires Iraq to respect all of its international obligations. Of course, this does not preclude Iraq from altering its international obligations in the future, through appropriate procedures, but it avoids a problematic unilateral amendment of treaty obligations and the significant uncertainty that could have arisen in the minds of Iraq's treaty partners about precisely which provisions in which treaties were inconsistent with Iraq's constitution.

As a final note, Article 9(first), which adopts verbatim the language from TAL Article 27(E), establishes that Iraq shall respect and implement its international obligations regarding the non-proliferation, non-development, non-production, and non-use of nuclear, chemical, and biological weapons.¹⁷⁶ We are uncertain which negotiators wanted to include this provision, which entered the draft late. It may have been included at the behest of the Kurds, who had included a similar provision in their July 28 proposals.¹⁷⁷ Given the political attention paid to the Iraqi government's alleged use of chemical weapons against the Kurds in the Anfal campaign,¹⁷⁸ and the fact that this event is the subject of a trial before the Iraqi

174. *Id.* art. 27.

175. See ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 130 (2000).

176. Compare IRAQ CONST. art. 9(first)(e), with TAL *supra* note 28, art. 27(E).

177. IRAQ CONST. art. 5 (July 28, 2005 KRG draft).

178. This refers to a series of military actions taken by the Iraqi regime in 1988 against the Kurds in northern Iraq in which the Iraqi regime allegedly used chemical weapons to kill tens of thousands of civilians. See HUMAN RIGHTS WATCH, *GENOCIDE IN IRAQ: THE ANFAL CAMPAIGN AGAINST THE KURDS* (1993), available at <http://hrw.org/reports/1993/iraqanfal/>.

High Tribunal,¹⁷⁹ the inclusion of this provision should be of no surprise.

B. Former Article 44

One article of the draft constitution that remained in the text as Article 44 until almost the end stated, "All individuals shall have the right to enjoy all the rights mentioned in the international treaties and agreements concerned with human rights that Iraq has ratified and that do not contradict the principles and provisions of this Constitution."¹⁸⁰ Except for the last clause, this provision is a narrower version of TAL Article 23, which guaranteed to Iraqis the "rights that befit a free people possessed of their human dignity, including the rights stipulated in international treaties and agreements, other instruments of international law that Iraq has signed and to which it has acceded, and others that are deemed binding upon it, and in the law of nations."¹⁸¹ While negotiators ultimately deleted this provision, the discussions surrounding it reflect some of the same concerns that Iraqi leaders confronted in the provisions on Islam with respect to the tension, real or perceived, between Sharia law and human rights, including some of the rights set forth in treaties such as the ICCPR.

This tension was visible early in the discussions. A July 20 version of this provision stated, "In addition to the rights granted to the Iraqi citizen in the Constitution, all Iraqis shall enjoy all rights stipulated in international treaties and agreements and other international law documents to which Iraq is a signatory or consents to or those that are binding on Iraq in accordance with international law statutes [sic] that do not contradict Islam."¹⁸² As with the attempt in Article 8 to caveat treaty obligations unilaterally, this phrase would likely have been inconsistent with Iraq's treaty obligations under international law.¹⁸³ Further, to an even greater extent than the caveat in Article 8, this caveat would make it unclear to treaty partners which treaty provisions Iraq would seek to override with Sharia rules. Sharia consists of a very broad category of principles and rules that are subject to multiple interpretations; unlike the provision in Article 2, which refers to "*established* provisions of Islam,"¹⁸⁴ no such limitation appeared here. A third problem with this approach is that, by incorporating only those treaty-based rights that do not conflict with provisions of Islam and by not addressing treaty-based rights that might have conflicted with "principles of democracy" and "rights and basic freedoms," it might have appeared to prioritize one element of Article 2 over the others.

By August 6, the caveat changed from one related to Sharia to the caveat seen in earlier versions of Article 8: individuals would be entitled to

179. The public prosecution bill in the Anfal case describes the charges. See Iraqi High Tribunal, *Public Prosecution Bill Of Al-anfal Case*, available at <http://www.iraq-ihl.org/en/doc/ppb.pdf>.

180. IRAQ CONST. §2, art. 44 (Aug. 21, 2005 draft).

181. TAL, *supra* note 28, art. 23.

182. IRAQ CONST. § 2, art. 23 (July 20, 2005 draft).

183. See *supra* text accompanying notes 168-174.

184. IRAQ CONST. art. 2 (first)(a) (emphasis added).

rights in international treaties to which Iraq is a party “that do not contradict the principles and provisions of the constitution.”¹⁸⁵ In addition to affecting the tone of the caveat, the change actually broadened the scope of the carve-out significantly. That is, under the previous language, Iraq would have endeavored to exempt itself from respecting only those treaty obligations that contradicted Sharia. Under the revised language, Iraq would have tried to exempt itself from respecting treaty obligations that were inconsistent with any part of the text—and, arguably, also more nuanced, albeit undefined, “principles”—of the constitution. As noted, as a matter of international law, Iraq was not free to use its domestic law to except itself from its international obligations. As a matter of domestic law, however, this language would have meant that the constitution’s provisions on negative and positive rights in Section Two could override Iraq’s various human rights treaty obligations. For example, if a provision in the constitution had prohibited someone facing the death penalty from seeking a pardon or commutation of sentence, a right provided by the ICCPR,¹⁸⁶ the constitutional provision would, by its terms, have prevailed over the treaty obligation. In addition, even if no constitutional provision directly conflicted with an international human rights treaty obligation, a court might well have interpreted the constitutional carve-out clause of former Article 44 as overriding treaty obligations deemed inconsistent with any established provision of Islam, either through operation of Article 2(first)(a) (though that clause is directed at “laws” rather than “treaty obligations”),¹⁸⁷ or on the theory that consistency with the established provisions of Islam is a “principle” of the constitution.¹⁸⁸

In any event, the Kurds appeared to recognize that such a provision, which attempted unilaterally to limit Iraq’s treaty obligations outside the accepted legal process for doing so, could raise serious questions under international law. However, as late as August 22 some Shia negotiators remained reluctant to excise the caveat.¹⁸⁹ At the very end of the negotiations, it seemed as though Shia negotiators, including the Constitutional Committee Chairman and some SCIRI leaders, were willing to remove the limitation on the rights contained in human rights treaties. However, in the final hours, negotiators (some of whom claimed that “Najaf”—an allusion to Grand Ayatollah al-Sistani—opposed deleting the caveat) decided to take the Article out entirely and leave Article 8 as the only reference to Iraq’s international obligations (other than Article 9’s obligations regarding weapons of mass destruction).

Some have argued that former Article 44’s deletion was a good thing; others have bemoaned its loss.¹⁹⁰ The effect of its deletion will only become clear over time. Those who believe that its deletion was a positive

185. IRAQ CONST. § 1, art. 10 (Aug. 6, 2005 draft).

186. See, e.g., ICCPR, *supra* note 40, art. 6(4).

187. IRAQ CONST. art. 2(first)(a).

188. Stilt, *supra* note 45, at 743.

189. IRAQ CONST. § 2, art. 44 (Aug. 22, 2005 draft).

190. BROWN, *supra* note 102, at 2 (2005).

event would argue that Article 44 could have created tension with Article 8, which clearly and unconditionally affirms Iraq's commitment to respect its international obligations. A litigant seeking to use former Article 44 to argue that she was entitled to certain rights contained in the ICCPR, for example, might well lose her case if the right she was invoking appeared to contradict a provision in the constitution. If only Article 8 existed, that litigant might have a better chance of arguing for the right's protection, because of the unqualified nature of Article 8 and because treaties such as the ICCPR require Iraq as a State Party "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in" that Convention.¹⁹¹ If former Article 44 had remained in the text, that litigant would have had to explain how Article 44 did not undercut her claim.

Those who wished to see former Article 44 preserved believed that it was a useful way to import directly into the constitution the rights and state obligations contained in the ICCPR,¹⁹² the Convention on the Elimination of Discrimination Against Women¹⁹³ (to which Iraq is a party with reservations), the Convention on the Elimination of Racial Discrimination,¹⁹⁴ the International Covenant on Economic, Social, and Cultural Rights,¹⁹⁵ and the Convention on the Rights of the Child.¹⁹⁶ Proponents of former Article 44 believed that, even with the caveat, the article would import certain rights that do not otherwise exist in Iraq's constitution.¹⁹⁷ Now, with the exclusion of this draft provision from the final text, Iraqi citizens who wish to invoke Iraq's international obligations when asserting

191. ICCPR, *supra* note 40, art. 2(1). Article 2(2) further requires each State Party to the ICCPR to "take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant." *Id.* art. 2(2). Article 8, in contrast to former Article 44, may provide an insufficient basis on which to invoke these rights if Iraq chooses to distinguish between self-executing and non-self executing treaties. Compare IRAQ CONST. art. 8, with IRAQ CONST. § 2, art. 44 (Aug. 21, 2005 draft). By affirming its international obligations, Iraq does not necessarily incorporate into its domestic law human rights treaty guarantees such that Iraqi citizens could invoke them in Iraqi court.

192. ICCPR, *supra* note 40.

193. G.A. Res. 34/180, at 34, U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, 1249 U.N.T.S. 13 (1980).

194. G.A. Res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, *entered into force* Jan. 4, 1969.

195. G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976.

196. G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), *entered into force* Sept. 2 1990.

197. This would include, for example, the right of a child whose parents reside in different States to maintain on a regular basis, save in exceptional circumstances, personal relations and direct contacts with both parents. See Convention on the Rights of the Child art. 10, para. 2, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3. Also included would be the obligation of the Iraqi government to eliminate discrimination against women in the areas of education, employment, and health care. See Convention on the Elimination of All Forms of Discrimination Against Women, arts. 10-12, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 13.

a particular human right not found in the constitution will have to do so on the basis of Article 8 of the constitution alone.

C. Procedural Treaty-Making Provisions

A few other provisions in the constitution touch on Iraq's international obligations.¹⁹⁸ Several provisions in Section Three of the constitution address procedural aspects of treaty-making. First, Article 61(fourth) provides that the COR shall regulate "the ratification of international treaties and agreements by a law, to be enacted by a two-thirds majority."¹⁹⁹ This provision replaces the TAL rule as to how treaties are ratified, because the TAL ceased to have effect when the constitution came into force.²⁰⁰ Iraq has long had a detailed law on the negotiation, conclusion, and ratification of treaties—Law No. 111.²⁰¹ Except to the extent inconsistent with the constitution, this law will presumably remain in effect unless and until the new government enacts a law that supersedes it.

Second, the drafters originally gave the power to sign and ratify treaties to the President.²⁰² However, assigning to the President the power to conclude treaties seemed to be a misallocation of responsibility, given the fact that the Prime Minister is the "direct executive authority responsible for the general policy of the State."²⁰³ As such, the Prime Minister or particular cabinet ministers would seem to be the most logical entities to negotiate and conclude international agreements that bind the Government of Iraq. At that time, the text was ambiguous as to which entity—the President, the Prime Minister, or Council of Ministers—would negotiate treaties for Iraq. Around August 15, the negotiators gave the Council of Ministers the authority "to negotiate and sign international agreements and treaties or to designate any person to do so."²⁰⁴ Thus, the negotiators left the President only with the nominal power to "ratify" international treaties and agreements.²⁰⁵

In usual parlance, a president's right to ratify international treaties and agreements suggests a substantive role, including the power to decline to ratify agreements. However, throughout negotiations, the drafters repeatedly stated that they intended the President to hold only "figure-

198. See *infra* Part III.D, for a discussion of potential limitations on Iraq's treaty-making power.

199. IRAQ CONST. art. 61(fourth).

200. The TAL gave the National Assembly the power to ratify international treaties and agreements. TAL, *supra* note 28, art. 33(F). It gave the Council of Ministers the authority, with the approval of the Presidency Council, to appoint representatives to negotiate treaties. *Id.* art. 39(A). In order for the negotiated treaty to be ratified, the Presidency Council had to recommend to the National Assembly the passage of a law that would ratify the treaty. *Id.*

201. Concluding the Treaties Law, Law No. 111 (1979) (Iraq) [hereinafter Law No. 111 (1979)].

202. IRAQ CONST. § 3, art. 42(c) (Aug. 2, 2005 draft).

203. IRAQ CONST. art. 78.

204. *Id.* art. 80(sixth).

205. *Id.* art. 73(second). This article also gives the President the power to "ratify and issue" the laws enacted by the COR. *Id.* art. 73(third).

head" powers in all respects. Indeed, toward the end of the negotiations, the drafters clarified their intent with regard to the treaty process by adding the provision that "international treaties and agreements are considered ratified after fifteen days from the date of receipt by the President."²⁰⁶

Based on the language alone, including the use of the word "ratify," it still may be possible to read an implied presidential power to veto treaties, as well as laws, within the fifteen-day period. This reading, however, is weakened by one textual argument and two non-textual factors. First, by giving the first-term Presidency Council a veto over legislation, the drafters demonstrated that they knew how to craft language to create such a veto.²⁰⁷ Their decision not to include similar language in Section Three, which creates a single position of President (and which will take effect only after the first term of the COR) supports a conclusion that they did not intend to give that office veto power over either laws or treaties.²⁰⁸ Second, individuals such as Jalal Talabani contemporaneously understood the drafters as intending only to give the President ceremonial powers.²⁰⁹ Third, if the drafters had intended to give the President veto power, they could have borrowed from the TAL, which expressly includes this power.²¹⁰ Their decision to use different language supports their stated intent to reduce the President's powers. Thus, the reading of this provision that conforms more closely to the drafters' intent is that laws and treaties will enter into force even if the President takes no action on them or objects to their content. In contrast, the President's power to "ratify death sentences" in Article 73(eighth) is not so caveated;²¹¹ thus, one might conclude that the drafters, inadvertently or otherwise, have given the President the ability to decline to ratify death sentences. This result would seem to leave Iraq in compliance with its obligations under Article 6 of the ICCPR, which, as mentioned above, requires a State Party to provide anyone sentenced to death the right to seek a pardon or commutation of the sentence.²¹²

Iraq's constitution does not contain a large number of articles establishing how treaties will fit into Iraq's overall legal framework. Nevertheless, negotiators generally understood and embraced the legal and symbolic implications of including basic provisions in the text that reinforced its commitment to its international obligations. Under Saddam, Iraq consistently ran afoul of such obligations, especially in the area of

206. *Id.* art. 73(second).

207. *Id.* art. 138(fifth).

208. Compare *id.* art. 138(fifth), with *id.* art. 73(second).

209. ITG President Talabani at one point threatened to withdraw his name as a candidate for the presidency under the Constitution because he believed that the Constitution only granted the President figurehead powers. See Lionel Beehner, *Forming a New Iraqi Government*, Council on Foreign Relations, Dec. 20, 2005, http://www.cfr.org/publication/9749/forming_a_new_iraqi_government.html ("Some say Jalal Talabani, Iraq's current president, may retain his title, though recent press reports suggest he wants more political power.").

210. TAL, *supra* note 28, art. 37.

211. See IRAQ CONST. art. 73(eighth).

212. ICCPR, *supra* note 40, art. 6(4).

human rights; the respect given to international obligations in the constitution presumably reflected an interest in seeing Iraq re-integrated into the international community.

IV. Women in the Constitution

Although there are not a large number of provisions in the constitution that specifically address women's rights or the role of women in government, several are worthy of mention. Provisions related to women can be divided into two main categories: provisions that highlight women as a group as entitled to, or in need of, special protections;²¹³ and provisions that give women certain rights associated with increased political or familial power.²¹⁴ Perhaps not surprisingly, the latter were the subject of much greater, more heated discussion.

A. Article 18(second): Transmission of Nationality

Article 18(second) states, "Anyone who is born to an Iraqi father or to an Iraqi mother shall be considered an Iraqi. This shall be regulated by law."²¹⁵ The inclusion in the constitution of a provision permitting an Iraqi mother to pass on her nationality to her child is an important advance in equality between men and women in Iraq.²¹⁶ This provision will also help Iraq comply with its international obligations under the ICCPR, which provides that each State Party must respect and ensure the right of every child to acquire a nationality.²¹⁷ In the absence of a rule permitting a child to inherit a nationality from his Iraqi mother, a child born to a father who lacks a nationality (a Palestinian, for instance)²¹⁸ would be born without a nationality.²¹⁹

213. See IRAQ CONST. § 2, art. 29(first), art. 30(first).

214. See *id.* art. 18(second).

215. *Id.*

216. For a discussion of the gender-based obstacles women face in many Middle Eastern nations, see Sameena Nazir, *Challenging Inequality: Obstacles and Opportunities Towards Women's Rights in the Middle East and North Africa*, <http://www.freedomhouse.org/template.cfm?page=163>.

217. See ICCPR, *supra* note 40, art. 24(3).

218. Refugees International describes hundreds of thousands of Palestinians as "stateless"—that is, without a nationality. Refugees International, *Lives on Hold: Middle East* (2004), available at http://www.refugeesinternational.org/section/publications/stateless_mideast/.

219. Article 18(fifth) of the constitution provides: "Iraqi nationality shall not be granted for the purposes of the policy of population settlement that disrupts the demographic composition of Iraq." During the negotiations, the drafters indicated to observers that this provision, which never was the subject of much contention among the drafters themselves, was meant to exclude Palestinians from acquiring citizenship in Iraq. Although most Palestinians are Arab Muslims, this provision was a reflection of Iraq's overall political stance on the Arab-Israeli conflict. That is, Iraq is unwilling to grant citizenship to Palestinians, because such action would effectively constitute an admission that the Palestinians in Iraq would never return to their former territory within Israel. Iraq's position is not unique among states in the Middle East. For instance, in 2002, Jordan declined to give Jordanian nationality to 100,000 Palestinians

This advance was far from secure during the negotiations: the drafters included and deleted the clause “or mother” repeatedly. The June 30 *Al Mada* draft contained two clauses related to the inheritance of nationality. Article 1(8) stated, “Iraqi women have the right to grant Iraqi nationality to their children” as well as to their non-Iraqi husbands residing in Iraq after five years of marriage.²²⁰ Article 1(10) further provided, “All Iraqis are equal and have the right to acquire or earn Iraqi nationality and to pass it to their spouses and children.”²²¹ The July 20 draft streamlined the nationality provisions generally, and reduced the unqualified inheritance right to one subject to regulation by law: “Children of an Iraqi woman shall be granted Iraqi citizenship in accordance with the law.”²²²

By July 22, the inheritance provision had moved toward its final phrasing, although the provision still addressed how a non-Iraqi woman married to an Iraqi man might seek citizenship:

An Iraqi is any person born to an Iraqi father or mother. A non-Iraqi woman who is married to an Iraqi man shall have the right to apply for Iraqi citizenship after residing in Iraq for a period not less than 5 continuous years from the date of her marriage.²²³

Under this language, the right would not have been reciprocal; a non-Iraqi man would not have been able to apply for Iraqi citizenship by virtue of his residence in Iraq and his marriage to an Iraqi woman.

The July 30 draft modified the two-sentence provision slightly, stating that a non-Iraqi woman would have the right to apply for citizenship after three years, or after giving birth.²²⁴ By August 6, drafters had deleted the sentence on non-Iraqi women, and let the provision on inheritance stand free of any reference to subsequent laws.²²⁵ Then, on August 8, as drafters considered the various complexities surrounding nationality issues,²²⁶ they added a blanket provision stating that a future law shall regulate the provisions of nationality.²²⁷ By August 21, the negotiators had decided to retain the right of women to pass their Iraqi nationality to their

because it continued to want to assert the Palestinians' right of return. *Jordan Refuses to Grant Citizenship to 100,000 Palestinians*, BBC MONITORING INT'L REPORTS, Oct. 16, 2002.

220. IRAQ CONST. § 1, art. 1(8) (June 30, 2005 *Al-Mada* draft), translated in BROWN, *supra* note 29, at 8.

221. *Id.* § 1, art. 1(10). The draft also would have permitted a woman married to an Iraqi man to earn Iraqi nationality through him. *Id.* § 1, art.1(9). Neither this concept, nor the concept of letting an Iraqi woman transmit her nationality to her non-Iraqi husband, appears in the final text.

222. IRAQ CONST. § 2, art. 5 (July 20, 2005 draft).

223. IRAQ CONST. § 2, art. 4(b) (July 22, 2005 draft).

224. See IRAQ CONST. § 1, art. 7(b) (July 30, 2005 draft).

225. IRAQ CONST. § 2, art. 7(sixth) (Aug. 6, 2005 draft). (“An Iraqi is any person born to an Iraqi father or mother.”).

226. This includes questions about when holders of senior government positions or positions related to national security may carry or must surrender dual citizenship, which arose because some negotiators were worried about Iranian influence in the federal government.

227. IRAQ CONST. § 2, art. 7(sixth) (Aug. 8, 2005 draft).

children.²²⁸

It was primarily Sunni negotiators and those from the Iraqiyya List who expressed an underlying concern about the right of a woman to pass on nationality to her child, and of a non-Iraqi man being able to apply for Iraqi citizenship on the basis of his marriage to an Iraqi woman. They articulated their concern as being based on the fear that Iraqi women would marry Iranian men and still claim Iraqi citizenship for their children, even though their children, through their father, might feel stronger loyalties toward Iran than toward Iraq.²²⁹ Further, they alleged a practice by Iraqi women of adopting children from Iran and claiming that their children were Iraqi. As the text began to solidify around August 23, the Sunnis continued to advocate that only Iraqi fathers should be able to pass on Iraqi nationality.²³⁰ The issue appeared in a number of Sunni proposals in the month between the “finalized” text and the referendum. As is reflected in the final version of Article 18, they were not successful in removing the phrase “or to an Iraqi mother” from the provision, although they did secure the addendum, “This shall be regulated by law,” to Article 18(second) in a last-minute change.²³¹ The change was legally unnecessary—Article 18(sixth) already stated that all of the nationality provisions would be regulated by law²³²—but the intent was to give Sunni opponents of the provision the ability to point clearly to a provision that would permit the right to be shaped by a future law. What that law will look like is, of course, unknown, but presumably the limitation imposed by Article 46 would prevent future legislators from eviscerating the essence of this right.²³³

228. The phrase “or mother” is found in brackets in the August 17, 18 and 20 drafts. IRAQ CONST. § 2, art. 5(first) (Aug. 17, 2005 draft); IRAQ CONST. § 2, art. 5(first) (Aug. 18, 2005 draft); IRAQ CONST. § 2, art. 5(first) (Aug. 20, 2005 draft). However, by August 21, “or mother” was inserted without brackets. IRAQ CONST. § 2, art. 20(first) (Aug. 21, 2005 draft).

229. The basis for this concern is linked to Sunni fears of undue Iranian influence on and in the Iraqi government as a result of longstanding religious and political ties between Iranians and the Iraqi Shia majority.

230. IRAQ CONST. § 2, art. 18(first) (Aug. 23, 2005 draft).

231. IRAQ CONST. art. 18(second).

232. IRAQ CONST. art. 18(sixth).

233. IRAQ CONST. art. 46. In early December, the TNA enacted a law on nationality and citizenship containing a number of provisions that could be deemed unconstitutional in the future, including a provision that would deny Iraqi Jews the right to reclaim their nationality, despite Article 18(third) which provides that “[a]ny person who has had his citizenship withdrawn shall have the right to demand its reinstatement.” *Id.* art. 18(third). The Presidency Council attempted to veto the law, but the TNA rejected the veto attempt as procedurally improper. Apparently, all three members of the Presidency Council had not signed the veto, even though the TAL required the Presidency Council to make decisions unanimously. TAL, *supra* note 28, art. 36(C). The TNA requested that the Presidency Council forward the law to the Official Gazette (a publication of the Iraqi Ministry of Justice that contains Iraqi laws) for publication, which the Council subsequently did. The Official Gazette published the law on March 7, 2006, so the law appears to be in force. See INTERNATIONAL RELIGIOUS FREEDOM REPORT 2006: IRAQ, *supra* note 97.

Although the constitution, as well as the TAL before it, provides that any person who had his citizenship withdrawn shall have the right to demand its reinstatement.

B. Article 49(fourth): Women's Quota in Parliament

The final text of Article 49(fourth) states, "The elections law shall aim to achieve a percentage of representation for women of not less than one-quarter of the members of the Council of Representatives."²³⁴ The language tracks precisely a phrase in Article 30(C) of the TAL.²³⁵ The fact that the constitution's text ended up mirroring the TAL provision belies the minefield through which this provision tiptoed during negotiations. There was significant debate about whether such a quota should exist, what percentage it should reflect, and whether the quota should be time-limited. There was also debate about where it should be located: in Section Two, as a right that the COR could not amend during its first two terms;²³⁶ in Section Six, where it would have been deemed a transitional provision, with the resultant implication that the quota should be temporally-limited;²³⁷ or in Section Three, where it fit more naturally, given the subject matter, but where it would be subject to amendment during the COR's first term.²³⁸

This quota provision appeared in the June 30 *Al Mada* draft.²³⁹ In this incarnation, the quota would have extended beyond the parliamentary body to "decision-making positions" and "ministries" for "two stages," which seems to refer to two election terms.²⁴⁰ It added, "[t]hen the proportion shall become open and according to ability," which suggests that the quota would disappear after two election terms.²⁴¹ The provision subsequently fell away from the next series of drafts. In the first days of August, a key Shia negotiator indicated that he was comfortable with a 25% women's quota for parliamentary seats, but that he was reluctant to have it last more than two election cycles. The quota reappeared around August 8

ment, the Transitional National Assembly (TNA) passed a citizenship law on November 15, 2005, that, among other things, specifically precludes local Jews from regaining citizenship. The Presidency Council (the president and the two deputy presidents) sent a notice to the TNA that it was vetoing this legislation, but the TNA challenged the legal effectiveness of the notice. The law came into effect in March 2006, when it was published in the *Official Gazette*.

Id.

234. IRAQ CONST. art. 49.

235. TAL, *supra* note 28, art. 30(C).

236. IRAQ CONST. art. 126(second) (stating that the provisions of §§ 1 and 2 of the constitution cannot be amended until the passage of two successive electoral terms, the approval of two-thirds of the members of the COR, the approval by public referendum, and ratification by the President with seven days). *Id.*

237. Virtually all of the provisions contained in the "Transitional Provisions" part of Section Six address governmental bodies that will expire in the foreseeable future or events that will take place in a relatively short time frame. For instance, the three-person Presidency Council, the powers of which are laid out in Section Six, exists only during the first four-year term of the COR. IRAQ CONST. art. 138. Likewise, Articles 134-136 address the dissolution of three existing Iraqi bodies: the Iraqi High Tribunal, the High Commission for De-Ba'athification, and the Property Claims Commission. IRAQ CONST. arts. 134-136.

238. IRAQ CONST. art. 126(third).

239. IRAQ CONST. art. 20(3) (June 30, 2005 *Al-Mada* draft), translated in BROWN, *supra* note 29, at 13.

240. *Id.*

241. *Id.*

in the transitional section, with a proviso that it last only two terms.²⁴²

Negotiators considered various options, including whether to: (1) incorporate the two-term limit but make it subject to possible renewal by law at the end of that period; (2) provide a straightforward allocation of seats (rather than use the TAL formulation, which relied on the electoral law to do the work); (3) permit the COR to review and change the quota by a two-thirds vote, which might or might not include a floor below which the new quota could not fall, e.g., not below 10%;²⁴³ or (4) require a constitutional amendment to make that change. The negotiators also discussed whether the review contemplated in option (3) above should take into account the rate at which women had been elected to the parliament.²⁴⁴ This might have been an artificial review were the electoral law to continue to require 25% female representation in the Council of Representatives, as it would have been impossible to evaluate the level of representation women would have garnered without that legislative requirement. By August 14, it was clear that the Iraqiyya List and the Kurds wanted no term limit on the quota in the parliament, and they seemed comfortable with the TAL language. The Shia, in contrast, still wanted the future parliament to review the quota after two electoral terms.

During much of the discussions, the quota paragraph resided in the transitional provisions section, which was first Section Seven, and then became Section Six.²⁴⁵ Around August 19, as the Shia ceased insisting on a term limit for the quota, negotiators recognized that the provision might reside more appropriately in a non-transitional section. They first moved it to Section Two, but those who resisted the provision insisted on locating it in Section Three, where, by virtue of Article 126, it would be possible to amend within the COR's first term.²⁴⁶ Moreover, it was natural to locate the provision in Section Three, which addresses the establishment of governmental institutions.²⁴⁷

Unlike the personal status provision, which left many women in Iraq uncomfortable, these two constitutional provisions offer clear and specific protections for women. The provision that permits a woman to pass her Iraqi nationality to her child is unusual in the region, and one with which Iraqi women reportedly were pleased.²⁴⁸ Similarly, the provision promot-

242. IRAQ CONST. § 7, art. 7 (Aug. 8, 2005 draft).

243. Since it was unlikely that women would win more than one-third of the seats in the COR, this third option would have meant that legislators could have amended the provision without the support of any of the women in the Council.

244. On August 24, a number of Iraqi women in government positions produced a paper on the constitution, proposing in part to amend the quota text to require at least 25% of seats be allocated to women "in all decision-making positions," as the June 30 *Al-Mada* draft provided. Their proposal was never adopted.

245. Compare IRAQ CONST. § 7, art. 7 (Aug. 8, 2005 draft), with IRAQ CONST. § 6, art. 151 (Aug. 23, 2005 draft).

246. IRAQ CONST. art. 49(fourth); *id.* art. 126.

247. *Id.* § 3.

248. Council on Foreign Relations, *Sharia, Women's Rights, and the Iraqi Constitution* [Rush Transcript; Federal News Service, Inc.], http://www.cfr.org/publication/9010/sharia_womens_rights_and_the_iraqi_constitution_rush_transcript_federal_news_ser

ing the goal of having women constitute one-quarter of the representatives in the COR will give Iraqi women one of the highest levels of parliamentary representation in the world.²⁴⁹

V. The Federal Judiciary

Unlike some of the other provisions in the constitution, such as those addressing the role of Islam or allocating responsibility over natural resources, the drafters' approach to the judiciary section was unfocused for much of the negotiations. Proposals for the structure of the federal judiciary, its degree of independence, and the exact body that would safeguard the constitution varied widely for much of August. Only when the negotiators began to nail down compromises on other hotly contested issues did they begin to concentrate seriously on provisions related to the judiciary.²⁵⁰ Nonetheless, it is possible to divide the drafters' concerns about the judiciary into two main areas: (1) what type of judicial institution should safeguard the constitution and what the jurisdiction of such an entity should be; and (2) who should occupy seats in the institution.

A. Judicial Review of the Constitution

1. *Constitutional Court?*

The struggle over what type of institution should exercise guardianship over the constitution was ultimately a dispute about the breadth of judicial jurisdiction and the role of judicial review in the new Iraq. The Shia initially proposed a Constitutional Court and then, in its place, a Constitutional Council with express authority to review legislation before its enactment. At the same time, the drafters of what became Section Three included provisions that would have maintained the existence of the Federal Supreme Court.²⁵¹ These proposals were disputed for two main reasons. First, at a structural level, the proposals, taken together, would have created two higher judicial bodies in the Constitution without explaining how they related to each other.²⁵² Second, at a substantive level, the Shia proposal to create a judicial institution that could review legislation prior

vice_inc.html (describing the unusual nature of the provision in the region and noting that Iraqi women were proud of Article 18).

249. Isobel Coleman, *Women, Islam, and the New Iraq*, Foreign Affairs, Jan./Feb. 2006, available at <http://www.foreignaffairs.org/20060101faessay85104-p10/isobel-coleman/women-islam-and-the-new-iraq.html>.

250. To our knowledge, Iraqi judges and other members of the ITG's Higher Juridical Council did not play a meaningful role in drafting, reviewing, or advising the constitutional drafters about the provisions on the judiciary, and they played no role at all during the most significant negotiations in August and September 2005.

251. TAL Article 44 created Iraq's Federal Supreme Court. TAL, *supra* note 28, art. 44.

252. Before the TAL took effect, Iraq's highest court was the federal Court of Cassation. See Iraqi Judicial Organization Law, Law No. 160, art. 12 (1979) (Iraq) (describing the Cassation Court "as the higher judicial body that practices the judicial monitoring over all courts unless the law stipulates otherwise"). Thus, in total, Iraq would have had three high courts, two of which would have been very new.

to its enactment heightened the concerns of more secular drafters that the Shia sought to ensure the Islamic content of legislation through a supervisory judicial body similar to that in Iran.²⁵³ Due to these concerns, the Kurds supported lodging constitutional review in the Federal Supreme Court, as the TAL did. The preference for a Federal Supreme Court was not rooted in a conviction that such a court would be better equipped than a Constitutional Court to interpret the constitution. Rather, the Kurds and other secularists adopted this preference because the idea of a Constitutional Court became inextricably linked to the notion that such a court would review legislation pre-enactment for consistency with Islamic law, while a TAL-like Federal Supreme Court would review laws and other promulgations only post-enactment, on the basis of individual cases.

The July 22 draft of the constitution included both a Federal Supreme Court and a federal Constitutional Court.²⁵⁴ As noted, there was no attempt, however, to coordinate the overlap between these two courts because different sub-committees of the TNA Constitutional Committee were responsible for each proposal. The judiciary subcommittee gave the Federal Supreme Court jurisdiction over matters arising from the application of federal law; disputes between the federal, regional, and governorate governments; and disputes between individuals and the federal government.²⁵⁵ The other subcommittee gave the Constitutional Court the primary tasks of "controlling the constitutionality of laws" and "interpreting the texts of the constitution," and made the Court's decisions final and binding.²⁵⁶

Creating both a federal supreme court and a constitutional court is not inherently problematic.²⁵⁷ Indeed, having a constitutional court separate from the rest of the judiciary is fairly common around the globe. Many Western European countries have long had separate bodies to decide constitutional matters,²⁵⁸ and recently-established democracies in South Africa, Hungary, Bulgaria, Czechoslovakia, as well as Muslim and Arab countries such as Turkey, Egypt, and Bahrain, also have constitutional courts.²⁵⁹

253. See *infra* note 274 and accompanying text.

254. IRAQ CONST. § 3, art. 8 (July 22, 2005 draft); *id.* § 5, art. 1.

255. *Id.* § 3, art. 8.

256. *Id.* § 5, arts. 5-6.

257. A constitutional court usually is not a court of appeals, but a tribunal to which questions of constitutional interpretation are referred by regular courts or by the political branches. Thus, a constitutional court generally does not decide cases; it decides issues referred to it, and its decisions are generally considered binding on ordinary courts and the political branches. Consequently, it is necessary to have a separate system of appellate courts to provide for appeals and to ensure uniform application of statutory law. In the post-World War II era, such courts exercise an increasing degree of control over the acts of the legislative and executive branches with a view toward protecting individual constitutional rights. See generally VICKI C. JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW 461-62, 475-76 (1st ed. 1999).

258. See *id.* at 469-472 (describing the constitutional court traditions in Austria, Germany, France, Italy, and Spain).

259. See Cheryl Saunders, *The Interesting Times of Louis Favoreu*, 5 INT'L J. CONST. L. 1, 10 (2007) (noting the wide-spread establishment of constitutional courts in the past

Despite its general similarities to the judicial structures of other countries, the early Iraqi draft raised several concerns. First, it failed to explain how the Federal Supreme Court, federal Court of Cassation, and Constitutional Court would relate to each other. Would the Federal Supreme Court or federal Court of Cassation submit an interlocutory inquiry to the Constitutional Court when a question of constitutional interpretation arose? Would the Federal Supreme Court or other Iraqi courts hear and decide cases initially, from which a party could appeal to the Constitutional Court, as the TAL envisioned for the Federal Supreme Court?²⁶⁰ Could the Constitutional Court hear cases in the first instance? The constitutional court models in other civil law systems and the long-standing Iraqi judicial rules of procedure may offer helpful guidance. However, the judiciary may have a difficult task accommodating three high courts within its system, two of which are essentially new.²⁶¹

Second, the Constitutional Court section only made oblique reference to the type of jurisdiction possessed by the Constitutional Court. The phrase "controlling the constitutionality of laws" gave no indication whether the Court would exercise this control over all pre-enactment legislation or only over a case or controversy that arose under a validly enacted law.²⁶² "Interpreting the text of the constitution" was likewise overly vague, as it did not specify whether the Court would be empowered to issue advisory opinions or would only be permitted to interpret the constitution in the context of an adjudication brought before the court.²⁶³ In addition to its vague jurisdictional grant, this section included no constitutionally-defined method for bringing questions before the Court. Admittedly, the COR or the Court could have resolved some of these questions, and the civil law background against which this Court was established may have helped set default boundaries for its jurisdiction. But by failing to address any questions in a constitution that is quite detailed in other areas, the drafters risked delaying the emergence of a functioning system of judicial review for some time.

2. *Constitutional Council?*

This structure remained unchanged until the second week of August, at which point it became clear that the Shia were eager to grant the Consti-

twenty years, including Hungary (1989); Czechoslovakia, Bulgaria, and Romania (1991-92); Columbia (1991); South Africa (1994); Bahrain (2002); and Egypt (2001)); Ceren Belge, *Friends of the Court: The Republican Alliance and Selective Activism of The Constitutional Court of Turkey*, 40 *LAW & SOC'Y REV.* 653, 656 (2006) (noting the Turkish Constitutional Court's establishment in 1961 and describing and analyzing its jurisprudence).

260. See TAL, *supra* note 28, art. 44(B)(3) (granting the Federal Supreme Court ordinary appellate jurisdiction).

261. Although a constitutional court might have meshed with an Iraqi legal system built on the civil law model, the drafters also carried forward the Federal Supreme Court from the TAL. The Federal Supreme Court is a relatively new institution in the Iraqi legal system, and it is not at all clear whether this Court can be incorporated easily into the Iraqi legal system and judicial apparatus.

262. IRAQ CONST. § 5, art. 5(1) (July 22, 2005 draft).

263. *Id.* § 5, art. 5(2).

tutional Court the authority to review draft legislation. After listing the jurisdiction to “control” the constitutionality of laws, the August 8 draft added in a parenthetical that this power included the competence to “[c]onsider the constitutionality of the laws before submitting them” to the COR.²⁶⁴ When the drafts re-merged after August 15,²⁶⁵ the operative draft established a Constitutional Council, rather than a Constitutional Court, and granted the Council authority to (1) “[e]xamine the constitutionality of laws before [their] promulgation, and internal bylaws of the legislative councils before [their] implementation;” (2) “[e]xamine the constitutionality of laws and the valid bylaws; (3) review regional constitutions before they are submitted to referendum; and (4) “[i]nterpret the text[] of the Constitution.”²⁶⁶

In contrast to the ambivalence with which they greeted the notion of a separate Constitutional Court, the Kurds and others immediately disliked the idea of a Constitutional Council, and directly opposed the Council’s power to review legislation pre-enactment. Although constitutional councils are not as common globally as constitutional courts, the Shia pointed to the French version as a model for Iraq’s Council.²⁶⁷ It was not clear, however, that the French model was a suitable fit for Iraq. First, although the French Conseil Constitutionnel now enjoys the authority to determine whether laws are substantively unconstitutional, its original purpose was to ensure that the legislature did not encroach on the enhanced power of the executive branch provided for in the 1958 constitution.²⁶⁸ Thus, its intended role was not to review laws generally for their compliance with all constitutional provisions. Second, in addition to the Conseil Constitutionnel, the French system also includes a Conseil d’Etat and the Cour de Cassation, both of which play a role in enforcing the constitution. The former assesses the legality of executive acts that have the force of law²⁶⁹ and specific administrative decisions, and the latter, though traditionally required to enforce parliamentary laws, now applies constitutional principles in

264. IRAQ CONST. § 6, art. 5 (Aug. 8, 2005 draft).

265. As noted in Part I, the texts diverged around August 11 when the leadership summit began making changes to the document on the basis of daily negotiations, while the TNA Constitutional Committee continued to work on the draft separately. On this issue, because the Shia were largely absent from the leadership summit over the first several days, those present agreed to do away with the Constitutional Court, lodge judicial review in the Federal Supreme Court, and give the court much of the same jurisdiction over constitutional issues that TAL Article 44 had granted it.

266. IRAQ CONST. § 6, art. 3 (Aug. 17, 2005 draft).

267. Article 61 of the 1958 French constitution gave the Conseil Constitutionnel the authority to review laws and regulations before their promulgation for their conformity with the Constitution. FR. CONST. art. 61.

268. Martin A. Rogoff, *A Comparison of Constitutionalism in France and the United States*, 49 ME. L. REV. 21, 73-74 (1997). The Conseil was necessary in part because the 1958 Constitution granted the executive expanded law-making powers and carefully enumerated the legislature’s powers. *Id.* at 74.

269. Article 34 of the 1958 French constitution enumerated parliament’s legislative competencies, and Article 37 provided that all other areas not included in the legislature’s enumerated authorities would be subject to regulation, which has been interpreted to mean executive regulation. *See id.* at 74; FR. CONST. arts. 34, 37.

refusing to enforce certain laws enacted by the legislature.²⁷⁰

In contrast to these aspects of the French system, the drafters of the Iraqi constitution, as of early August, appeared to be creating a structure in which the legislature would be the exclusive law-making power and the Presidency mostly a ceremonial post.²⁷¹ Thus, there appeared to be less of a need to create a body that would be able to police the boundary between legislative action and executive action having the force of law. Furthermore, although the French structure eventually developed the additional capacity to review whether laws were substantively unconstitutional, it did so only after over a decade operating pursuant to its original purpose.²⁷² Giving an untested Council in Iraq such substantive review powers from the outset might have induced it to intervene too often in the legislative process. Indeed, unlike the French council, which reviews laws during the period between enactment and promulgation,²⁷³ the provisions relating to the Iraq Constitutional Council failed to specify the period during which the Council could review draft legislation, leaving open the possibility that the Council could become deeply, and problematically, enmeshed in the legislative process.

In further contrast to the French system, the Iraqi draft constitution seemed to envision the Constitutional Council as the exclusive entity to assess the constitutionality of laws, arguably leaving uncertain whether the other higher courts in Iraq could apply constitutional principles to the cases before them. Whether this feature would have created particular problems within the Iraqi system is unclear, but it highlighted additional differences between the French and proposed Iraqi systems. Finally, beyond the differences between the French model and the Iraqi proposal, some negotiators feared that the Shia were actually seeking to fashion a Constitutional Council similar to Iran's Guardian Council, which consists of a group of Islamic clerics and jurists who ensure that all laws passed by the Islamic Consultative Assembly are compatible with Islam.²⁷⁴

270. See Rogoff, *supra* note 268, at 75-78.

271. Under the new Constitution, the Prime Minister holds most of the executive authority. See IRAQ CONST. art. 78. However, the Iraqi Constitution does not appear to expressly grant the Prime Minister any law-making function other than the negotiation and conclusion of treaties.

272. See Rogoff, *supra* note 268, at 75.

273. See *supra* note 267.

274. See IRAN CONST. arts. 91-99. Article 91, which created the Guardian Council, states:

With a view to safeguard the Islamic ordinances and the Constitution, in order to examine the compatibility of the legislation passed by the Islamic Consultative Assembly with Islam, a council to be known as the Guardian Council is to be constituted with the following composition: (1) six religious men, conscious of the present needs and the issues of the day, to be selected by the Leader, and (2) six jurists, specializing in different areas of law, to be elected by the Islamic Consultative Assembly from among the Muslim jurists nominated by the Head of the Judicial Power.

Id. art. 91. Article 94 provides that all legislation passed by the Islamic Consultative Assembly must be sent to the Guardian Council for authoritative review. *Id.* art. 94.

Kurdish and other secular negotiators slowly began chipping away at a Constitutional Council that could review laws prior to their enactment. By August 21, these negotiators had convinced the Shia Alliance to drop its demands for a Constitutional Council and for certain areas of jurisdiction, such as prior review of regional constitutions before they went to popular referendum.²⁷⁵ Even after the Shia Alliance agreed to jettison the Constitutional Council, however, they pushed for prior review of legislation by the Federal Supreme Court. On August 26, however, the Kurds were able to force the removal of any reference to prior review of laws.²⁷⁶

The final language gave the Federal Supreme Court responsibility for "[o]verseeing the constitutionality of laws and regulations in effect," and for "[i]nterpreting the provisions of the constitution."²⁷⁷ There is no doubt that ambiguities still remain with regard to how the Court will exercise its judicial review authority pursuant to these two provisions. Nevertheless, the compromise does help avoid the structural issues that may have arisen with both a Constitutional Court/Council and a Federal Supreme Court and the political problems that may have emerged with the review of legislation prior to enactment.

B. Court Membership

The second significant issue that pervaded discussions on the judiciary concerned the type of jurists who would evaluate, interpret, and apply constitutional principles. The July 22 draft called for a nine-member Constitutional Court.²⁷⁸ Five members would be judges nominated by the Higher Juridical Council²⁷⁹ and approved by a two-thirds vote of the COR; four members would be chosen from Sharia canonists, law professors, and lawyers with at least twenty years experience, nominated by the Council of Ministers and also approved by a two-thirds vote of the COR.²⁸⁰ By August 8, the size of the court had expanded to eleven members, with the same general proportion of judges nominated by the Higher Juridical Council and non-judges nominated by the Council of Ministers.²⁸¹

By August 17, the draft dropped any express requirement that the Constitutional Council include judges in its makeup and arguably made it possible for the Constitutional Council to be dominated by Sharia scholars.²⁸² The new draft stated that the Council would be comprised of

275. IRAQ CONST. § 3, art. 92 (Aug. 21, 2005 draft) ("The Federal Supreme Court shall be the final authority in interpreting the text of the constitution.").

276. IRAQ CONST. § 3, art. 92 (Aug. 26, 2005 draft).

277. IRAQ CONST. art. 93.

278. IRAQ CONST. § 5, art. 2 (July 22, 2005 draft).

279. See TAL, *supra* note 28, art. 45 (establishing the Higher Juridical Council, defining its primary responsibility to assume the role of the former Council of Judges, and describing the composition of the new Council).

280. IRAQ CONST. § 5, art. 2 (July 22, 2005 draft). The Council of Ministers consists of the Prime Minister and his executive cabinet. See IRAQ CONST. arts. 76-86 (describing the composition and functions of the Council of Ministers).

281. IRAQ CONST. § 6, art. 2(first) (Aug. 8, 2005 draft).

282. See IRAQ CONST. § 6, art. 1 (Aug. 17, 2005 draft).

eleven members, "representing Sharia canonists, professors of law, lawyers, and legal counselors."²⁸³ It also imposed general requirements on all members, prescribing that members had to meet the qualifications that members of the COR had to meet.²⁸⁴ Further, it provided that three additional factors had to be taken into consideration: The member had to be at least fifty years old, have at least twenty years of legal experience, and have an academic position of at least assistant professor.²⁸⁵ The draft did not clarify whether a member had to meet all three criteria, one or more criteria, or none at all. Finally, the draft stated that a future law would regulate the mechanism for nomination to the Council.²⁸⁶

The Kurds and other secular negotiators found these new provisions problematic for at least two reasons. First, unlike the previous drafts, which ensured that over half of the members of the court would be judges, this draft only required some representation by a few categories of potential jurists on the Council, none of which specifically included judges. The provision failed to specify, moreover, how many from each category had to be appointed. Second, instead of requiring an absolute or supermajority vote by the COR for nominations, which would ensure that only widely accepted jurists would be nominated, the new draft simply provided that a law, approved by a simple majority, would prescribe the nomination mechanism. These provisions seemed to confirm the worst fears of secularists—a majority Islamist legislature passing a law requiring a minimum of one of each type of listed jurist on the Council and simple majority approval of each member nominated, thus creating the possibility that the legislature could fill most of the Council with Sharia canonists and provide for only token representation by other jurists.

Once the parties agreed not to create a Constitutional Council, the Shia attempted to transfer their preferred make-up of the Council to the Federal Supreme Court by lobbying for a court that consisted of "jurists, Sharia canonists, and experts." The Shia Alliance argued that it was important to have Sharia experts on the Court, because, they asserted, interpreting Sharia law was a unique profession requiring a special set of skills. The Kurds and Iraqiyya List nevertheless objected to this for several reasons.²⁸⁷ First, secular parties perceived the Arabic phrase proposed for "Sharia canonists" as an overt attempt to import the entire code of life contemplated by Sharia into constitutional interpretation. The phrase used was "*fuqaha' Sharia*." "*Fuqaha*" loosely translates as "scholars of the *fiqh*,"

283. *Id.*

284. The Constitution does not describe in detail the qualifications necessary to become a member of the COR. Instead, it simply provides that a COR member must be "a fully qualified Iraqi" and that otherwise the eligibility requirements shall be determined by legislation. See IRAQ CONST. art. 49(second) and (third).

285. See IRAQ CONST. § 6, art. 2 (Aug. 17, 2005 draft).

286. *Id.* § 6, art. 5.

287. The Kurds at one point suggested that the Federal Supreme Court have twelve members, including four Kurds, and that decisions would require the assent of three-quarters of the membership, or nine out of twelve members. This proposal never made it into an official draft and quickly fell away.

or Islamic law. Thus, the word “*fuqaha*” by itself suggested the presence of Islamic law scholars on the Court. Some suspected that the addition of the word “Sharia” was intended to make clear that the entire set of rules embodied by Sharia should be the standard against which the constitution would be interpreted. Second, secular parties up to that point had negotiated successfully to keep the word “Sharia” out of the document and simply did not want to allow a reference to Sharia at that stage of the negotiations. These parties, moreover, still feared that an express reference to Sharia experts, without a specification of how many from each category of jurists would be on the Court, would lead to attempts to pack the Court with Sharia scholars. Finally, the August 21 draft preserved the requirement that the COR approve Federal Supreme Court members by a simple majority, thereby making it less likely that moderate, consensus candidates would be appointed.²⁸⁸

By August 23, the negotiators had agreed that a future law, requiring supermajority approval of the COR, would define the method of selection of members to the Federal Supreme Court, but the Court’s composition still included “Sharia experts,” which continued to concern the more secular parties.²⁸⁹ A new formulation—experts in Sharia, democracy, and human rights—was suggested on the grounds that the Court needed experts in all three areas mentioned in Article 2 of the constitution: Islam, democracy, and human rights. Secularists rejected this formulation as well, however, because they feared that a member could specialize in Sharia but claim to be an expert in all three areas. Another proposed compromise would have referenced “civil law” to ensure that some Federal Supreme Court members were trained in codified Iraqi law in addition to Islamic law. This was rejected, however, on the ground that justices would need to know more than civil law.²⁹⁰ The negotiators finally agreed to a membership of “judges, experts in Islamic jurisprudence, and legal scholars.”²⁹¹

The final agreement illustrates the extent to which the parties ultimately could not agree. By deferring the method of selecting of members, the number of members on the Court, and even some of the work of the Federal Supreme Court to subsequent legislation,²⁹² the negotiators tacitly acknowledged that they were still far apart on what the court should look like. Perhaps the biggest achievements of the more secular negotiators were to ensure that the future law enacted with regard to nomination to the Court itself would require supermajority approval and that the Court would have at least one judge, and possibly more, on it.

288. IRAQ CONST. § 3, art. 61(fifth)(a) (Aug. 21, 2005 draft).

289. IRAQ CONST. § 3, art. 90(second) (Aug. 23, 2005 draft). In a shift from previous drafts, however, the negotiators restored the category of “judges” to the list. *Id.*

290. The reluctance to include a reference to experts in civil law may have been based on an understanding that “civil law” embodied only the civil code, which addresses areas such as property and contracts, but not the entire range of Iraqi codified law. See Civil Code (1951) (Iraq), translated in 3 BUSINESS LAWS OF IRAQ 65 (Nicola H. Karam trans., 1990).

291. IRAQ CONST. art. 92(second).

292. *Id.*

C. Summary

By the time the negotiators finalized the draft, and despite some of the potential problems identified above, it appeared that they had developed a better sense of the role the Federal Supreme Court could play.²⁹³ The drafters ultimately established the Court's jurisdiction over a number of areas well-suited for a high court, including the power to settle disputes between the federal government and sub-federal governmental entities, among sub-federal governmental entities, and between federal judicial institutions and sub-federal judicial institutions.²⁹⁴ Without an impartial, independent court to adjudicate such disputes, their resolution would at best be left to political will and at worst armed conflict. Other tasks, such as settling accusations against certain high officials and ratifying election results, seemed to be attempts to give the Court power in areas where disputes could lead to a constitutional crisis.²⁹⁵ Indeed, the Court's final heads of jurisdiction are comparable to those of high courts in Western Europe.²⁹⁶ To the extent that Iraqi factions are willing and able to eschew violence as a means of resolving disputes arising from many of the constitution's most hard-fought compromises, the Court could prove to be a natural home for their peaceful settlement.²⁹⁷

VI. Section Four: Distribution of Authorities

A. Introduction

Section Four of the Iraqi constitution includes some of the most hotly contested issues between the Shia Alliance and the Kurdish Alliance: how to control and distribute oil, gas, water, and other natural resources, as well as the proceeds therefrom.²⁹⁸ The Section also reflects the broader struggle between the Shia and the Kurds regarding the strength of the national government. Ultimately, throughout the negotiations, the Kurds obtained significant concessions from the Shia Alliance, both on individual issues and on the shape of the Section itself. In the area of oil and gas, the Kurds were able to secure almost exactly what they set out to achieve, and arguably expanded their authority beyond what the TAL provided concerning natural resources;²⁹⁹ in other areas, the Kurds were able to reduce the list of exclusive authorities of the national government from even the relatively

293. Indeed, the decision to defer composition issues to a supermajority-approved future law likely constituted recognition of the Court's looming importance.

294. IRAQ CONST. art. 93(fourth)-(fifth), (eighth).

295. See *id.* art. 93(sixth)-(seventh).

296. See JACKSON & TUSHNET, *supra* note 257, at 469-71 (noting areas of jurisdiction of several European high courts).

297. See IRAQ CONST. art. 93(fourth). For example, the oil and gas and water resources provisions could lead to disputes between the regional and federal governments, particularly because these provisions prescribe vague standards like "fair" distribution.

298. See *id.* arts. 110(eighth), 111-112, 114(second), (seventh).

299. Compare *id.* art. 112, with TAL, *supra* note 28, art. 25(E).

narrow list delineated in the TAL.³⁰⁰

B. Initial Structure

The TNA Constitutional Committee originally addressed the distribution of authorities between federal and sub-federal governments by enumerating a list of exclusive federal authorities only. From its July 22 draft, it is obvious that the Committee used as its foundation the authorities described in Article 25 of the TAL. The first four exclusive authorities enumerated in the July 22 draft, on foreign policy, national security, financial policies, and the regulation of weights and measures, largely mirror subsections (A) through (D) of TAL Article 25.³⁰¹

The July 22 draft, however, went further than the TAL by delineating more explicitly federal authority over water and by mandating exclusive federal authority over electricity, environment, education, and health.³⁰² The July 22 draft also revealed the Committee's lack of consensus on the treatment of oil and gas by providing three alternatives: (1) ownership by all Iraqis, management by the federal government, and allocation of portions of revenues to producing regions, all to be regulated by law; (2) ownership by all Iraqis, management by the federal government in cooperation with regions, and allocation of portions of revenues to producing regions, all to be regulated by law; or (3) ownership by all Iraqis, exploitation by the regional governments under federal government supervision, distribution of revenues to the producing governorate, federal government, and regional governments according to set percentages.³⁰³

From July 22 until the second week of August, Section Four remained largely unchanged.³⁰⁴ When the texts of the Shia-driven TNA Constitutional Committee draft and the leadership summit document diverged around August 10, changes to this section began to take place on two parallel tracks. During this time, as well as after the two drafts merged on and shortly after August 15, the drafters focused much more intently on the oil and gas provisions. Because the treatment of oil and gas became the linchpin of the negotiations by the third week of August, independent of almost all other issues, we discuss oil and gas separately from the other authorities of Section Four. In addition, the following discussion explains how, over multiple iterations, the negotiators arranged and rearranged the provisions of this Section. This detailed description illustrates the drafters' efforts, often conflicted, to achieve the proper balance of federal and non-federal influence in particular areas, and how that balance changed during the negotiations. Although this Section of the constitution is entitled "Powers of the Federal Government," there is a wide spectrum of ways in which the federal and sub-federal governments can balance authority, such as exclu-

300. Compare IRAQ CONST. art. 110, with TAL, *supra* note 28, art. 25.

301. IRAQ CONST. § 5, art. 2(1)-(4) (July 22, 2005 draft); TAL, *supra* note 28, art. 25(A)-(D).

302. IRAQ CONST. § 5 art. 2(8)-(12) (July 22, 2005 draft).

303. *Id.* § 5, art. 2(5).

304. See IRAQ CONST. § 5, art. 2 (Aug. 6, 2005 draft).

sively federal, federally-led with regional participation, regionally-led with federal participation, and exclusively regional (or governorate). A number of these points along the spectrum are reflected in the negotiation and final structure of this section. Thus, explaining how negotiators struck these balances may be useful for later attempts to divine the framers' intent as to the proper proportion of federal and sub-federal authority in a particular substantive area.

C. Specific Authorities

1. Oil and Gas

On August 11, after the texts diverged, and in the absence of progress among the negotiators on the issue of oil and gas, the U.S. Government offered a proposal that would have called for (1) ownership by the people, (2) management by the federal government in consultation with the regions and governorates, and (3) revenue distribution by the federal government in a fair and equitable manner, to be stipulated by law.³⁰⁵ On August 13, in negotiations mainly among the Kurds, led by Masoud Barzani, Ayad Allawi, and secular Sunnis such as Hajim al-Hassani and Adnan Pachachi, the Kurds proposed new language that was almost identical to the final language on oil and gas in the Constitution. The proposal called for popular ownership of oil and gas extracted from "current fields,"³⁰⁶ federal government management of these resources in partnership with the regions and governorates, and revenue distribution "in a just manner in proportion to the population distribution in all parts of the country," with an allotment for a specified time to regions "damaged or deprived of such income by the former regime."³⁰⁷ The August 13 proposal went on to require that such distribution must lead to balanced development around the country.³⁰⁸

The Kurds, of course, demanded a larger regional role in managing oil and gas resources, likely due to their dual desires to ensure that they would not be neglected by future federal governments and to legitimize contracts the Kurdish Regional Government (KRG) previously had entered into with foreign companies for extraction of natural resources, including oil.³⁰⁹ The most significant aspect of the Kurds' August 13 proposal was their

305. Notes on file with authors.

306. Terms like "current fields," "present fields," and "existing fields" are inherently ambiguous. The Kurds may have intended the proposed term to mean fields where oil and gas are currently being extracted, but it is at least plausible to define terms like "current" and "present" much more expansively to encompass fields identified by seismic surveys, whether or not exploration has begun. The Iraqi government is still in the process of enacting a new oil and gas law, which the Council of Ministers has approved but which the COR continues to consider. See *Renewal in Iraq*, <http://www.whitehouse.gov/infocus/iraq> (reporting that Iraq's Council of Ministers approved the hydrocarbon law but that the draft law will need to be enacted by the COR).

307. IRAQ CONST. § 5, art. 2(eighth) (Aug. 14, 2005 draft).

308. *Id.* A future law was to specify the details of this arrangement. *Id.*

309. See Sumedha Senanayake, *Iraq: Kurdish Oil Law Poses Problem for Baghdad*, RADIO FREE EUROPE/RADIO LIBERTY, NOV. 8, 2006, <http://www.rferl.org/featuresarticle/2006/11/2c572f6a-4ab1-4986-9832-eabb726f3652.html>.

effort to limit popular ownership and federal government involvement to "current fields," thereby impliedly giving the regions full ownership and authority over the management and revenue distribution of any "future" resources.³¹⁰ Indeed, to further emphasize and ensure the limited nature of federal government authority over oil and gas resources, the Kurds proposed to move this provision to the section containing transitional provisions.³¹¹ This also was the first time that the notion of a special allotment of revenue for harmed or unjustly deprived regions was included.³¹² The stated purpose for such language was to compensate areas of the Shia south and Kurdish north that lost agricultural land to oil development and to counterbalance the adverse environmental impact that accompanied oil development.³¹³ The validity of this argument, however, is questionable, as it is unclear how much of the land used for oil exploitation was arable.

Once the Constitutional Committee draft merged with the leadership summit draft after August 15, the resulting text no longer included the two alternatives on oil and gas proposed by the United States and KRG and provided for in the August 14 summit leadership draft.³¹⁴ Instead, based on the continued work of the TNA Constitutional Committee on its draft during the second week of August, the August 17 draft split the treatment of these natural resources between subsections on exclusive and joint competencies.³¹⁵ In the former subsection, the drafters tentatively granted the federal government the power to "formulate local and foreign investment related to the development of the oil industry by a future law."³¹⁶ In the latter, the drafters tentatively put forth the U.S. bridging proposal that provided for ownership by the people, federal government management in consultation with regions and governorates, and revenue allocation in a fair and equitable manner, all to be regulated by law.³¹⁷

The August 20 draft marked an abrupt shift in language by reverting to the use of Article 25 of the TAL instead;³¹⁸ this proposal failed quickly, however.³¹⁹ The draft also revealed the Kurds' continued interest in reinserting a close facsimile of their August 13 proposal.³²⁰ This Kurdish alternative also would have made the regions and governorates responsible for

310. See IRAQ CONST. § 5, art. 2(eighth) (Aug. 14, 2005 draft).

311. Perhaps the truest reflection of Kurdish desires is the July 28 Kurdish proposals for the draft constitution, which would have granted the governorates ownership and control of all natural resources and the authority to distribute revenues, including an allocation of 35% to the federal government. IRAQ CONST. ch. 4, art. 67 (July 28, 2005 KRG draft).

312. IRAQ CONST. § 5, art. 2(eighth) (Aug. 13, 2005 draft).

313. Notes on files with authors.

314. IRAQ CONST. § 5, art. 2(eighth) (Aug. 14, 2005 draft).

315. IRAQ CONST. § 4, arts. 2(sixteenth), 3 (Aug. 17, 2005 draft).

316. *Id.* § 4, art. 2(sixteenth).

317. *Id.* § 4, art. 3.

318. IRAQ CONST. § 4, art. 1(fifth) (Aug. 20, 2005 draft); TAL, *supra* note 28, art. 25(E).

319. Compare IRAQ CONST. § 4, art. 2(fifth) (Aug. 20, 2005 draft), with IRAQ CONST. § 4, art. 112(ninth) (Aug. 21, 2005 draft) (only stating "natural wealth is oil and gas").

320. IRAQ CONST. § 4, art. 2(fifteenth) (Aug. 20, 2005 draft) (including a close facsimile of the Kurdish proposal in boxed text).

setting forth a strategic oil policy “in agreement with the federal government,” rather than vice-versa.³²¹ As with the treatment of resource management, however, this alternative would have deferred the details of any investment policy to future legislation, understood elsewhere in the draft as federal legislation. Federal legislative action may have been somewhat inappropriate since this formulation was arguably intended to give the regions and governorates the primary role in formulating strategic oil policy.

The next draft, which emerged on August 21, made only passing reference to natural resources, stating simply in the concurrent authorities provision, “natural wealth is oil and gas.”³²² Even this language was boxed, suggesting uncertainty about its inclusion. The primary reason for the almost complete absence of natural resources language here is that this issue became the crux of the negotiations between August 18 and August 21. Kurdish and Shia leaders intimated that any grand compromise on the overall constitution depended first and foremost on the resolution of this dispute. As a result, negotiations on the rest of the text stalled while Kurdish and Shia leaders traded proposals on how to structure this provision. There were four points of dispute: (1) ownership, (2) management and revenue distribution, (3) the resources at issue, and (4) development of strategic oil policy.

As described earlier, the Kurds were intent on limiting ownership by the Iraqi people to existing oil and gas resources so that it could own and control all resources discovered in the future in the Kurdish region.³²³ Another proposal to dilute the ownership guarantee would have made resources “for the benefit of” the Iraqi people, rather than “owned by” them. The Kurds ultimately acceded, approving language giving the Iraqi people ownership of all oil and gas resources, whether present or future, but, significantly, succeeded in importing the present/future dichotomy elsewhere by limiting management by the federal government with the governorates and regional governments to present fields.³²⁴

The second issue in contention was the allocation of management and revenue distribution responsibilities over the resources from present fields between the federal government and the producing regions or governorates. The parties spent considerable time on the few words describing this relationship, in part because they may have recognized that the existing fields would likely produce most oil income in Iraq for the next several years. The Kurds proposed formulations to ensure a Kurdish veto over any management and revenue distribution plans, while the Shia countered with language suggesting that the federal government would have the ultimate decision-making power over management and revenue distribution. Thus, the Kurds proposed that the federal government would

321. *Id.*

322. IRAQ CONST. § 4, art. 112(ninth) (Aug. 21, 2005 draft).

323. *See supra* note 306, for a brief discussion on the ambiguity of terms like present, current, or existing resources/fields.

324. IRAQ CONST. arts. 111-12.

manage “in partnership with” the producing regions and governorates, implying that the federal government could not act without the consent of the producing regions or governorates; the Shia responded with the phrase “in consultation with” to suggest that the federal government would be the ultimate arbiter, whether or not the producing regions and governorates agreed. With no agreement, the parties again traded language when the Kurds proposed “together with,” and the Shia responded with “in cooperation with.” The sides finally agreed to leave the character of the relationship relatively vague by simply using “with.”³²⁵

Third, the parties disputed the types of natural resources that would be covered. Operating under the presumption that any powers not given expressly to the federal government by the constitution would go to the regions, the Kurds wanted to limit the objects of regulation as much as possible. The Shia had pushed for “natural resources,” then “oil, gas, and minerals,” and finally relented, accepting the more limited “oil and gas,”³²⁶ which exclude the phosphate industry, described as profitable by some negotiators.³²⁷ The final area of dispute concerned authority over strategic oil policy. Unlike the language from the August 20 draft, which appeared to give primary control over strategic oil policy to the regions and governorates,³²⁸ the Kurdish-Shia agreement reflected in the August 22 draft provided for equal control by the federal and sub-federal governments and, arguably, made the federal government the primary coordinator of such policy.³²⁹ The draft also limited the policy-makers to the *producing* regions and governorates, rather than letting all regions and governorates have a voice, as the earlier draft had done.³³⁰ The final language states: “The federal government, with the producing regional and governorate governments, shall together formulate the necessary strategic policies to develop the oil and gas wealth in a way that achieves the highest benefit to the Iraqi people using the most advanced techniques of the market principles and encouraging investment.”³³¹

Once the Kurds and Shia had agreed on this finely parsed oil and gas language, it changed no further. The drafters ultimately placed these compromise provisions between the two articles listing exclusive authorities and joint authorities, thereby implying that the joint competency in regulating oil and gas were to be treated differently than the other list of joint competencies.³³²

325. *Id.* art. 112.

326. *Id.* § 4, arts. 111-12.

327. Notes on file with authors.

328. IRAQ CONST. § 4, art. 2(fifteenth) (Aug. 20, 2005 draft).

329. IRAQ CONST. § 4, art. 2(fifteenth) (Aug. 22, 2005 draft) (“The federal government together with the producing regional governorates shall draft the necessary strategic policy to develop oil and gas . . .”).

330. Compare *id.* with IRAQ CONST. § 4, art. 2(fifteenth) (Aug. 20, 2005 draft).

331. IRAQ CONST. art. 112(second).

332. IRAQ CONST. arts. 110-112, 114.

2. Other Authorities

As described above, the July 22 draft included a more robust list of exclusive federal authorities than the list included in the TAL.³³³ During the August 13 and 14 negotiating sessions, however, the Kurds made an effort to reduce these authorities.³³⁴ Moreover, despite the awkwardness of addressing regional authorities in a section on exclusive federal authorities, the Kurds insisted on new language requiring management and organization of customs, airspace, seaports, health policy, and education policy “in coordination with the regional government.”³³⁵ Not every proposal diminished federal power; however, some negotiators suggested additions to federal authority during the session as well. Namely, the drafters gave the federal government the power to “regulate commercial policy across regional and governorate boundaries,” which brought federal commercial authority back to TAL levels,³³⁶ and to organize and oversee national elections, which may have been included by virtue of provisions elsewhere in the constitution requiring the federal government to take certain actions in this area.³³⁷

What emerged from the crucible of August 15 was a section on the distribution of authority that combined the two texts that had diverged during the preceding week. (While the Kurds and others made changes to the text during the second week of August, the Constitutional Committee text on this section remained largely unchanged.) The August 17 draft

333. See *supra* text accompanying note 302.

334. For instance, it appears that the Kurds tried to remove the federal government's exclusive authority “to defend Iraq as well as guard its borders.” Compare IRAQ CONST. § 5, art. 2(second) (Aug. 9, 2005 draft), with IRAQ CONST. § 5, art. 2(second) (Aug. 14, 2005 draft). This particular suggested deletion may have revealed a division within the Kurdish Alliance. Although the Kurds may have sought this change in August, the July 28 Kurdish proposal for a draft constitution gave the federal government the exclusive authority to establish the armed forces to defend the country and protect its borders. IRAQ CONST. § 3, art. 24(second) (July 28, 2005 KRG draft). Nevertheless, the July 28 Kurdish proposal for the constitution suggested a desire to cabin federal authorities even further than the TAL did; it included a list of exclusive federal authorities that covered many of the same areas as the TAL, such as foreign policy, national security, immigration, nationality, finance, trade, and fiscal policy, including the establishment of a central bank, but described these authorities much more sparingly. Compare IRAQ CONST. § 3, art. 24 (July 28, 2005 KRG draft), with TAL, *supra* note 28, art. 25.

335. Agreed changes on August 13 required regulation of airspace, outer space, and seaports in coordination with the regional government “and governorates.” IRAQ CONST. § 5, art. 2(tenth) (Aug. 13, 2005 draft). The reference to governorates and outer space dropped out on August 14. IRAQ CONST. § 5, art. 2(tenth) (Aug. 14, 2005 draft).

336. See IRAQ CONST., § 5, art. 2(fourth) (Aug. 12, 2005 draft). While one might have assumed that the prior absence of commercial regulatory authority was attributable to a Kurdish desire to limit federal government power, in fact, the July 28 Kurdish proposal contemplated at least one aspect of such authority by giving the federal government the exclusive authority to organize “trade policies over regional borders in Iraq.” IRAQ CONST. ch. 3, art. 24(third) (July 28, 2005 KRG draft). This language is similar to the formulation that ended up in the final constitution. See IRAQ CONST. art. 110(third). Thus, the addition of this provision may have been as much a Kurdish wish as any other group's.

337. IRAQ CONST. § 5, art. 2(eighteenth) (Aug. 14, 2005 draft); see also IRAQ CONST. § 6, arts. 10–14 (Aug. 14, 2005 draft).

showed that the federal government had regained the exclusive authority to “guarantee the security of the borders, and to defend Iraq;” to regulate air-space and seaports; and to regulate “service, salaries, and rewards.”³³⁸ The language on water resources also had changed substantially. On July 22, the federal government had the authority to “[o]versee the exploitation of the main water resources and regulate irrigation and dams . . . whose waters flow into the Tigris and Euphrates.”³³⁹ By August 17, the federal government had the more general authority to formulate the “policy of water resources” and guarantee its “fair distribution.”³⁴⁰

An additional small but significant change in the August 17 draft was that the chapeau sentence no longer described these authorities as exclusive. Rather, it stated that the federal government “shall be competent” with respect to such authorities.³⁴¹ Despite this change, the drafters appeared to expect these competencies to remain exclusively federal, because the draft also included a new section on joint competences, which incorporated the pre-August 14 provisions on joint management of health and education policy, for instance.³⁴²

The August 18 draft modified the list of “exclusive” federal authorities, albeit with changes in brackets.³⁴³ The drafters suggested adding “investment” to the provision on economic and foreign trade policy, but proffered language stating that encouragement of investment would occur “in concurrence with the governorates and the regions.” The drafters also introduced alternatives in the provision on telecommunications, giving the federal government authority to regulate “communication” policy or the much narrower “bandwidth frequency” policy.

By August 21, the drafters had reverted to a structure that expressly divided these competencies between exclusive and concurrent authorities.³⁴⁴ The new provision on exclusive authorities in the August 21 draft, to a great extent, still mirrored Article 25 of the TAL. In contrast to the TAL, however, the August 21 draft included a number of additional authorities: “wealth distribution” (in brackets), mail policy, putting forward bills for the general and investment budget, and regulating license rights in public ports. The exclusive authorities section no longer included authorities concerning customs, wages policy, telecommunications generally, or any language on natural resources.³⁴⁵ Indeed, this draft only specified the exclusive power to regulate “broadcast frequencies,” rather than telecommunications generally, a decision almost certainly influenced heavily by

338. IRAQ CONST. § 4, art. 2(second), (ninth), (fifteenth) (Aug. 17, 2005 draft).

339. IRAQ CONST. § 5, art. 2(eighth) (July 22, 2005 draft).

340. IRAQ CONST. § 4, art. 2(eleventh) (Aug. 17, 2005 draft).

341. IRAQ CONST. § 4, art. 2(second) (Aug. 17, 2005 draft).

342. *Id.* § 4, arts. 3–4.

343. IRAQ CONST. § 4, art. 2(fifteenth)-(twenty-first) (Aug. 18, 2005 draft).

344. IRAQ CONST. § 4, arts. 110, 112. (Aug. 22, 2005 draft). The August 20 draft reflected a push, supported temporarily by the Shia, to insert verbatim the provisions of Article 25 of the TAL. Compare Iraq Const. § 4, art. 2 (Aug. 20, 2005 draft), with TAL, *supra* note 28, art. 25.

345. IRAQ CONST. § 4, art. 110(sixth) (Aug. 21, 2005 draft).

the Kurds.³⁴⁶ Due to its similarities with Article 25 of the TAL, this version naturally failed to carry forward from previous drafts the federal government's power to regulate airspace, water, the environment, or something the drafters termed "general planning polices." The drafters shifted most of these authorities to the section on concurrent authorities.³⁴⁷

This draft also included for the first time the provision that became Article 115 of the final constitution. Wedged between the section on exclusive and concurrent authorities, the awkwardly worded draft provision stated, "All competencies not stipulated in the exclusive competencies of the federal authorities shall be that of the regions, and [regarding] the other joint competencies between the federal and regional authorities, in case of contention, the priority is for the regional law."³⁴⁸ Like many of the changes to this section, this language probably was the handiwork of the Kurdish negotiators. Unlike the provision in its final form, which referred to regional and governorate authority, this version only focused on regional power—it gave no authorities to the governorates not organized into a region. The provision carried forward the concept contained in Article 54(B) of the TAL, which permitted the Kurdistan National Assembly to amend the application of any federal law within the Kurdistan region, to the extent that the matter did not fall within the exclusive authorities of the federal government as defined in TAL Article 25.³⁴⁹

The tumult that marked the second set of deadline negotiations on August 22 produced a draft that bolstered the federal exclusive authorities. The drafters returned to the exclusive powers section (1) the authority to "formulate customs policy," (2) control over the population census, and (3) a version of the water language.³⁵⁰ This draft described the federal government's exclusive power over water entering Iraq from external sources: The federal government was to "[p]lan policies relating to water sources from outside Iraq and guarantee [the] rate of water flow to Iraq in accordance with laws and international conventions."³⁵¹ The drafters deleted from the list of exclusive authorities "wealth distribution" and the power to regulate public ports.³⁵² Given the additions to the exclusive authorities section, the drafters deleted references to water and the population census and provided for the joint *management* of customs in the section on concurrent authorities.³⁵³ Also deleted from this section was the regulation of

346. The July 28 Kurdish proposal did not include "telecommunication" as an exclusive federal authority. See IRAQ CONST. ch. 3, art. 24 (July 28, 2005 KRG draft).

347. *Id.* § 4, art. 112.

348. *Id.* § 4, art. 111.

349. TAL, *supra* note 28, art. 54(B).

350. IRAQ CONST. § 4, art. 108 (third), (eighth), (ninth) (Aug. 23, 2005 draft).

351. *Id.* § 4, art. 108(eighth).

352. *Id.* § 4, art. 108.

353. See *id.* art. 112. Thus, the federal government retained exclusive authority to formulate customs policy, while the federal government and regions would concurrently manage and organize customs. This compromise was likely a result of Kurdish insistence that the KRG continue to be able to collect customs duties for its own governmental purposes from goods entering Iraqi Kurdistan from abroad.

antiquities.³⁵⁴

Section Four saw few changes after August 22, primarily because that date marked the deadline for the TAL extension taken on August 15.³⁵⁵ Despite passage of the deadline, however, debate over certain language continued. The main changes reflected in the August 26 draft were in the area of concurrent authorities. The drafters added back the concurrent authority to regulate via future law "the main water sources policy in a way that guarantees fair distribution."³⁵⁶

The other significant set of changes resulted from the Shia-led effort to enable governorates not yet organized into regions, in addition to already-formed regions, to exercise concurrent authorities. At almost the last moment, the Shia Alliance made a concerted effort to give governorates the same or similar governmental authority that the constitution gave regions. Thus, the drafters agreed to give governorates concurrent authority in customs management, environmental regulation, health policy, and educational policy.³⁵⁷ The only concurrent powers still reserved for the federal and regional governments alone were electricity regulation, development and general planning policies, and water sources regulation.³⁵⁸ Significantly, the drafters also expanded the final Article 115 language by providing that all powers not stipulated in the federal government's exclusive authorities "shall be the powers of the regions *and the governorates that are not organized into a region*."³⁵⁹

The draft was formally submitted to the TNA on August 28 as the complete draft.³⁶⁰ Nevertheless, the Shia and Kurdish factions still had not worked out a limited number of differences, including how to regulate internal water sources. The Kurds wanted as much regional control as possible over the rivers passing through Iraqi Kurdistan. Thus, they pushed the Shia to accept an "exclusive authorities" formulation that did not include central government authority to guarantee the "just distribution" of water resources within Iraq. The Shia objected to the Kurdish position,

354. See *id.* Earlier drafts, including the August 22 draft, had suggested a provision in the concurrent authorities section on the regulation of antiquities. See IRAQ CONST. § 4, art. 112(eighth) (Aug. 22, 2005 draft) (providing concurrent authority "to regulate, preserve and maintain antiquities and the archeological, cultural and educational sites and the historical buildings and other cultural assets").

355. On the night of August 22, Hajim al Hassani, Speaker of the TNA, submitted a draft constitution to the TNA, but asked for additional time to resolve remaining differences. Lionel Beehner & Sharon Otterman, *Iraq: Drafting the Constitution*, Council on Foreign Relations, Aug. 23, 2005, <http://www.cfr.org/publication/8044/iraq.html?breadcrumb=default>. The TNA accepted a revised draft on August 28. See Filkins & Worth, *supra* note 2, at A1 (reporting that Iraqi political leaders formally presented the draft constitution to the National Assembly).

356. IRAQ CONST. § 4, art. 112(seventh) (Aug. 26, 2005 draft).

357. *Id.* § 4, art. 112(first), (third), (fifth), (sixth). This effort is illustrated in the federalism section of the draft as well, where governorates along with regions are ensured representation in Iraqi embassies and diplomatic missions to follow cultural, social, and developmental affairs. *Id.* § 5, art. 117(fifth).

358. *Id.* § 4, art. 112(second), (fourth), (seventh).

359. *Id.* § 4, art. 113 (emphasis added).

360. See Filkins & Worth, *supra* note 2.

fearing that the Kurds would divert significant amounts of water from rivers flowing through the northern part of Iraq, such as the Tigris and its tributaries, away from the central and southern parts.³⁶¹ The constitution's final language (1) gives the federal government exclusive authority to enact "[p]lanning policies relating to water sources outside Iraq and [to] guarantee[] the rate of water flow to Iraq and its just distribution inside Iraq in accordance with international laws and conventions;" and (2) creates the shared authority "[t]o formulate and regulate the internal water resources policy in a way that guarantees their just distribution."³⁶² With the inclusion of "just distribution inside Iraq" in the exclusive authority provision, the compromise reflected something of a Shia victory. Nevertheless, the final language created significantly overlapping authority between the federal government and the regions to the extent that external water sources flowing into Iraq join with water sources originating in and remaining inside Iraq, and because both provisions appear to cover the just distribution of water inside Iraq. Ultimately, as with other areas of overlapping authority, the Federal Supreme Court could be well positioned to resolve any conflicts that arose between the federal and regional governments.³⁶³

Finally, on October 12, as part of the set of final changes to the constitution, Iraqi leaders added a provision to Section Four on the regulation of antiquities.³⁶⁴ Like the treatment of oil and gas, they included the provision on antiquities between the article in the text that lists exclusive authorities and the article that lists concurrent authorities. Article 113 states: "Antiquities, archeological sites, cultural buildings, manuscripts, and coins shall be considered national treasures under the jurisdiction of the federal authorities, and shall be managed in cooperation with the regions and governorates, and this shall be regulated by law."³⁶⁵ Previously, drafters had proposed that the regulation of antiquities come expressly under the concurrent authority provision.

3. Analysis

The drafting of Section Four is instructive in at least two ways: (1) it demonstrated the contrasting Shia and Kurdish visions of how the political entity of the new Iraq would look; and (2) it may assist a textual analysis of otherwise ambiguous provisions.

361. There may also have been a religious rationale. Some of the negotiators explained that a particular *hadith* (recorded sayings and deeds of the Prophet Mohammed) mandated that water should be accessible to all Iraqis.

362. IRAQ CONST. arts. 110(eighth), 114(seventh).

363. The constitution grants the Court jurisdiction over disputes between the federal government and regional and governorate governments. IRAQ CONST. art. 93(fourth).

364. *Id.* art. 113.

365. *Id.*

(a) The Kurdish-Shia Power Struggle

Perhaps most obviously, the drafting history shows the relative success of the Kurds during the negotiation process. The July 22 draft, compiled under the tutelage of the Shia Chairman of the Constitutional Committee, would have granted the federal government exclusive authority in a range of areas much wider than anything provided for by the TAL.³⁶⁶ Furthermore, all of the different alternatives for the regulation of natural resources enumerated in the July 22 draft would have given a supervisory role to the federal government.³⁶⁷ By the end of the process, however, many of the exclusive authorities in the earlier drafts had been shifted to the section on joint competencies, and the federal government's authority to directly manage oil and gas had been cut back to apply expressly only to resources from "present fields."³⁶⁸ The result, therefore, favored the overall Kurdish interest in limiting the role of the federal government in Iraq and ensuring broad powers for the KRG.

The drafting history also reveals a late decision by the Shia Alliance to push to expand the governmental authority of governorates not yet organized into a region. At first blush, the reasons for this change in direction seemed unclear. Shia leaders had a natural incentive early in the negotiations to push for a strong central government, because the majority of the country is Shia and, consequently, a majority of the COR was likely to be Shia, if not affiliated with the Shia Alliance. In addition, there was little historical foundation for robust governorate authority in Iraq. Even under the TAL and early drafts of the constitution, the governorates had little or no legislative authority, though the TAL shifted greater administrative authorities to the governorates.³⁶⁹ Further, the oil and gas compromise, which appeared to have made revenue flows to the central government less certain, did not fully explain the Shia change in position, as they were poised to exert significant influence over the revenues from present fields as part of the governing coalition of the federal government and over the exploitation of future fields as the majority population of southern producing governorates.³⁷⁰ Finally, during the constitutional negotiations, Abdul Aziz-Hakim, the leader of SCIRI, publicly supported the creation of a nine-province region in southern Iraq.³⁷¹ Thus, to the extent the Shia Alliance was concerned about the limitations of federal government generally, it is not clear why it did not revert to Hakim's focus on regional powers. Given these factors, the sudden Shia push to give greater policy control to

366. Compare IRAQ CONST. § 5, art. 2 (July 22, 2005 draft), with TAL, *supra* note 28, art. 25.

367. IRAQ CONST. § 5, art. 2(5) (July 22, 2005 draft).

368. As described below, Article 112(second) may permit the federal government to retain some element of indirect management through policy-setting. See *infra* Section VI.D.1.

369. TAL, *supra* note 28, arts. 52, 55-57.

370. See MARR, *supra* note 117, at 13-14.

371. Dexter Filkins, *Iraqi Talks Move Ahead on Some Issues*, N.Y. TIMES, Aug. 21, 2005, at A10.

governorates appeared anomalous.³⁷²

A couple of related factors may have contributed to the Shia's interest in increasing the power of governorates. First, the Shia may have feared that the constitution (or future laws) would ultimately impose higher hurdles to region-formation than existed in the draft at that time. At the point in the negotiations when the Shia pushed for expanded governorate authority, the process of regionalization only required a request by either one-third of the members of each affected governorate council or one-tenth of the population of each affected governorate, as well as a majority vote in favor of forming a region in a general referendum in each affected governorate.³⁷³ If Shia negotiators feared that this process would become more cumbersome (and if they had given up hope of a robust central government), however, they may have decided preemptively to seek additional governorate authority. The second factor is that Shia negotiators may have realized that opinion within the Shia bloc, despite Hakim's public statements, was not as uniformly in favor of regionalization as they once had believed. If the Shia were concerned that the support within the Alliance for forming southern regions no longer existed or was less certain than Hakim suggested, then increasing the power of the governorate would serve as a useful back-up plan.

In short, the drafting history of Section Four illustrates the Kurdish-Shia struggle over the structure of Iraq. In particular, it demonstrates Kurdish success in limiting the scope of exclusive federal government powers and suggests the internal tensions within Shia views about how power should be distributed in Iraq.

(b) Textual Ambiguities in Articles 115 and 121

As noted above, the drafting history may also facilitate the textual analysis of two sets of ambiguous, potentially conflicting constitutional provisions - the oil and gas provisions and Articles 115 and 121. By way of background, Article 115 states that, in areas of concurrent authority, regional and governorate law shall have "priority" over federal law to the extent the two are inconsistent.³⁷⁴ Article 121(second) provides that regions may "amend the application of the national legislation in that region" when there is a contradiction between regional and national law with respect to a matter outside the federal government's exclusive

372. The final Shia effort to give governorates substantive policy-making authority makes unclear the future contours of governorate authority. On one hand, the negotiators left unchanged Article 122, which specifically addresses "governorates that are not incorporated in a region," and which makes no reference to independent governorate legislative or policy-making authority. IRAQ CONST. art. 122(second). Rather, Article 122 only grants governorates "broad administrative and financial authorities," which shall be regulated by law (presumably federal law). *Id.* On the other hand, Articles 114 and 115 would appear to grant governorates significant substantive policy-making and legislative authority in areas of concurrent authority. *Id.* arts. 114-15.

373. IRAQ CONST. § 5, art. 115(second)-(third) (Aug. 26, 2005 draft).

374. IRAQ CONST. art. 115.

authority.³⁷⁵

The first significant ambiguity concerns the relationship between these provisions and the oil and gas provisions of the Constitution. On one hand, Articles 115 and 121(second) could be read to permit regional or governorate laws to trump federal laws concerning oil and gas regulation in certain circumstances, because the constitution technically provides for concurrent jurisdiction over these natural resources. On the other hand, one might argue that the drafters, choosing to address oil and gas separately in Articles 111 and 112 rather than within Article 114 on concurrent authorities, did not intend regional or governorate law automatically to trump federal laws on oil and gas.

The tenor of the oil and gas negotiations strongly argues for the second reading. The drafters battled over the oil and gas language for weeks, ultimately holding up negotiation of all other unresolved areas until treatment of natural resources was resolved. In contrast, an early version of Article 115 arrived in the document for the first time on August 21 with little or no debate preceding its inclusion in the document.³⁷⁶ It seems quite unlikely that the drafters, while undertaking painstaking efforts to agree that the federal government would manage oil and gas and distribute income "with" the producing regional and governorate governments, would have intended to upend such carefully negotiated language through the insertion of a last minute provision giving regional and governorate governments primacy over federal regulation in areas of concurrent authority. In addition, the drafting history shows that negotiators considered addressing oil and gas within provisions on exclusive and concurrent authorities in earlier drafts, but, with the final compromise, decided to address oil and gas outside of the exclusive-concurrent dichotomy.³⁷⁷ Similarly, although Article 121(second) derives from Article 54(B) of the TAL and was included in the draft Constitution somewhat earlier than Article 115,³⁷⁸ the singular focus on resolving the distribution of authority over oil and gas, in conjunction with the separate textual treatment of these provisions, suggests that the more reasonable reading is that the drafters did not intend Article 121(second) to override the careful compromise on oil and gas.

The second significant ambiguity relates to the text of Article 115 itself. The initial clause of Article 115—"All powers not stipulated in the exclusive powers of the federal government belong to the authorities of the regions and the governorates that are not organized in a region"³⁷⁹—could be read to mean that the federal government maintains no authorities outside its area of exclusive competence. There are at least two textual

375. IRAQ CONST. art. 121(second).

376. IRAQ CONST. § 4, art. 111 (Aug. 21, 2005 draft).

377. See, e.g., IRAQ CONST. § 4, arts. 2(sixteenth) and 3 (Aug. 17, 2005) (describing oil and gas investment policy in the exclusive authority provision, and other oil and gas authorities under the umbrella of "joint competences").

378. See IRAQ CONST. § 4, art. 4(B) (Aug. 19, 2005 draft).

379. IRAQ CONST. art. 115.

arguments for rejecting this interpretation. First, Article 121(second) presumes that the federal government has the power to enact legislation outside the area of exclusive federal authority, by providing for regional law supremacy "[i]n case of a contradiction between regional and national legislation in respect to a matter outside the exclusive powers of the federal government."³⁸⁰ Second, many sections of the constitution that address areas outside the scope of Article 110 on exclusive authorities contemplate that the federal legislature will enact laws to give substantive provisions greater definition and shape.³⁸¹

Here, as above, the negotiating history may help resolve any lingering textual ambiguity. The late date on which the drafters introduced Article 115 is not by itself a reason to discount the meaning of the plain language. However, the timing and ambiguity of the provision, when juxtaposed against other provisions that clearly support the federal government's prescriptive legislative power outside its area of exclusive federal authority, support disregarding conflicting or unworkable readings of the language. Instead, Article 115 should be interpreted to achieve consistency with the rest of this Section and other provisions discussing the respective primacy of federal and regional law.

D. Whither Federal Power?

One significant criticism of the constitution is that it deals a serious blow to federal power in Iraq.³⁸² Without federal control over future oil and gas resources, one fear is that the federal government's income stream will soon evaporate, leaving that government incapable of providing effective services throughout the country. The list of the federal government's exclusive authorities, moreover, is relatively limited, and Articles 115 and 121 give regions and governorates the authority to preempt federal legislation in all areas of concurrent authority.³⁸³ Further, Article 126(fourth) provides that constitutional amendments that take away power from a region require approval of both the regional legislature and the majority of the affected region's citizens.³⁸⁴ Even if Iraqi courts largely disregard the

380. *Id.* art. 121(second).

381. See *infra* Section VI.D.2 (discussing the federal government's prescriptive authority beyond Article 110, based on the drafters' intent and the Constitution's text and structure). In numerous instances, constitutional provisions specify that a law will further regulate the right or duty described. See, e.g., IRAQ CONST. art. 30(2) (guaranteeing social services and providing that they shall be regulated by a law), art. 32 (obligating the State to care for the handicapped, which shall be handled by a law.), art. 34(fourth) (guaranteeing public and private education, which shall be regulated by law), art. 38(c) (guaranteeing the freedom of assembly, as regulated by law).

382. See JONATHAN MORROW, *WEAK VIABILITY: THE IRAQI FEDERAL STATE AND THE CONSTITUTIONAL AMENDMENT PROCESS 3* (United States Institute of Peace, Special Report No. 168, July 2006), available at <http://www.usip.org/pubs/specialreports/sr168.pdf> (noting deficiencies in the final text including the failure to provide for a strong Iraqi state); Editorial, *Iraq's Unsettling Constitution*, N.Y. TIMES, Aug 23, 2005, at A16 (noting the weak federal government produced by the draft constitution).

383. IRAQ CONST. arts. 110, 115, 121.

384. *Id.* art. 126(fourth).

more limiting and problematic reading of Article 115 regarding the scope of federal authority, the constitution still does not explicitly address what powers, if any, the federal government possesses in addition to its list of exclusive authorities.³⁸⁵

Despite these obstacles, and although the constitution arguably creates a weaker central government than the one that existed under the TAL, its provisions, particularly in Section Four, do not necessarily constitute the death-knell for an effective federal government in Iraq. The constitution does not definitively answer questions in this area, but, based on the provisions themselves, the structure of the document, and the drafters' intent, there are reasonable arguments that the federal government could exercise a more robust authority than currently anticipated.

1. Oil and Gas

In the area of oil and gas resources, the federal government arguably could have control or influence over the development of all such resources. The oil and gas provisions are ambiguous by design and do not establish a simple rule regarding control of resources. Article 111 states, "Oil and gas are owned by all the people of Iraq in all regions and governorates."³⁸⁶ The practical meaning of this provision is not entirely clear, but it could support an interpretation that the revenue from the sale of these resources, as well as the resources themselves, belong to all the people of Iraq in all the regions and governorates. Pursuant to this interpretation, the federal government might enact legislation exerting control over all such revenue, possibly through a national account from which distribution could take place according to an agreed-upon revenue-sharing formula.³⁸⁷ However, a federal law along these lines might be in tension with other constitutional language that appears to grant regional and governorate governments greater autonomy over the resources extracted from "future" fields.³⁸⁸

Article 112(first) provides that the federal government, "with" the producing regional and governorate governments, will manage oil and gas extraction from *present* fields and distribute the resulting revenue according to a specific standard.³⁸⁹ The provision also states, however, that sub-

385. During negotiations, some were concerned about the ability of regional law to override federal law in all areas except those within the exclusive competence of the federal government and, thus, suggested language that would have carved out another category of federal laws whose application was not amendable by regional law: federal law on subjects that cannot be effectively dealt with by the legislation of individual regions, or subjects on which it is important to maintain legal or economic unity. The proposal did not succeed, but illustrated an interest by some in providing greater breadth to the exclusive list of authorities.

386. IRAQ CONST. art. 111.

387. As noted, the Iraqi government is still in the process of enacting a new oil and gas law. See *supra* note 306.

388. See *id.* art. 112(first).

389. *Id.* Article 112(first) provides, in full:

The federal government, with the producing governorates and regional governments, shall undertake the management of oil and gas extracted from present fields, provided that it distributes its revenues in a fair manner in proportion to

sequent legislation will regulate this entire process.³⁹⁰ Thus, the extent of federal control over these resources will depend in part on future *federal* legislation that defines the federal and producing regional and governorate management process. Such legislation could address the scope of the term “present fields,” and, in particular, how advanced, presumably at the time the constitution took effect, the development of an oil field must be to qualify as “present.” How broadly or narrowly such legislation defines the term “present” may depend in part on the composition of the parliament. Because this legislation only requires simple majority approval, it is plausible that the more nationalist-minded members of parliament could enact a law that defines important terms like “present fields” expansively.³⁹¹

One implication of Article 112(first) is that *future* fields are not subject to the same standard of management and revenue distribution as present fields and, thus, may be controlled exclusively by the producing region or governorate. But this reading of Article 112 may not be completely accurate, because Article 112(second) states that the federal and producing regional and governorate governments “shall together formulate the necessary strategic policies to develop. . . oil and gas wealth in a way that achieves the highest benefit to the Iraqi people using the most advanced techniques of. . . market principles and encouraging investments.”³⁹² Because this provision makes no distinction between present and future fields, any strategic policy arguably would address both. Thus, even if the regional governments have an implied authority to manage oil and gas extraction from future fields without the organizing federal legislation, the constitution does seem to contemplate that the federal government will help create the strategic policies for developing these fields. Assuming that the “necessary strategic policies” subsume all future oil development, the federal government may have views about any contracts related to such development, but it is not exactly clear how it will make known or enforce these views.³⁹³

If the federal government actively involves itself in oil and gas development at the expense of regional or governorate influence, and a conflict

the population distribution in all parts of the country, specifying an allotment for a specified period for the damaged regions which were unjustly deprived of them by the former regime, and the regions that were damaged afterwards in a way that ensures balanced development in different areas of the country, and this shall be regulated by a law.

Id. (emphasis added). The emphasized language constitutes the standard according to which revenue distribution must occur.

390. *Id.*

391. See *supra* note 306 (noting the current deliberations on a new oil and gas law).

392. *Id.* art. 112(second).

393. Article 112(second), unlike Article 112(first), does not expressly provide for regulation by law. See *id.* art. 112. Nevertheless, federal legislation would be at least a plausible method by which strategic policies could be agreed upon and implemented. Moreover, given that most of the federal government's exclusive authorities are framed in terms of policy formulation but presumably allow federal law-making in these areas, see *id.* art. 110, Article 112(second)'s failure to provide for legislation should not preclude it.

arises, Article 93(fourth) gives the Federal Supreme Court jurisdiction over the dispute.³⁹⁴ Although there is no Federal Supreme Court precedent from which to draw guidance, the Court, as a national institution, may well be inclined to side with the federal government in such disputes, thus insuring a continued role for the federal government in many aspects of oil and gas management.³⁹⁵

2. Other Authorities

Federal government power on issues other than oil and gas may likewise not be as limited as it first appears in the constitution. After completion of the draft constitution, there was some concern, heightened by Article 115, that the federal government lacked authority to exercise power in areas not encompassed by Section Four, in particular, the power to tax.³⁹⁶ However, several arguments based on the text, structure, and drafters' intent support the federal government's authority to legislate beyond what Section Four enumerates, potentially even to the exclusion of regional or governorate laws.

First, the drafters clearly intended the federal government to have legislative authority outside of what was listed in Section Four. We heard many negotiators explicitly state throughout the constitution's drafting that references in the text to future regulation by law included future regulation by *federal* law. Article 28(first), for instance, provides that "[n]o taxes or fees shall be levied, amended, collected, or exempted, except by law."³⁹⁷ This "law," according to drafters, would include federal law, despite the absence of an explicit constitutional grant of federal tax power.³⁹⁸ Second, although phrases like "shall be regulated by law" or "except by law" may refer to sub-national law, interpreting this phrase only to encompass sub-federal law would be illogical in certain areas. For instance, Article 12(first) requires that the flag, national anthem, and

394. Article 93(fourth) grants the Court the power to "[s]ettl[e] disputes that arise between the federal government and the governments of the regions and governorates, municipalities, and local administrations." IRAQ CONST. art. 93(fourth).

395. Commentators have discussed the alleged phenomenon, in the U.S. context, of the federal judiciary favoring federal power at the expense of state power in the U.S. context. See, e.g., Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1842 (2005).

396. See International Crisis Group, Middle East Briefing No. 19, *Unmaking Iraq: A Constitutional Process Gone Awry*, (Sept. 26, 2005), available at <http://www.crisisgroup.org/home/index.cfm?id=3703> [hereinafter ICG Briefing] (noting the vagueness and ambiguity regarding who has the taxation power); see IRAQ CONST. art. 115.

397. IRAQ CONST. art. 28(second).

398. In the area of tax, in particular, the federal government might even assert the exclusive power to tax pursuant to its exclusive power, under Article 110(third), to formulate fiscal policy, which arguably includes both the power to raise government revenue through taxation and to decide how such revenue should be spent. Although this reading of Article 110(third) could cause friction with regions or governorates that are inclined to tax their citizens, it avoids pitfalls that arise if the tax power is considered a concurrent authority to the extent that, under Articles 115 and 121, regions and governorates not organized in a region may, in areas of concurrent authority, override federal law. *Id.* arts. 115, 121.

emblem of Iraq be regulated by law.³⁹⁹ Similarly, Article 124(second) provides that the status of Baghdad, the capital of Iraq, shall be regulated by law.⁴⁰⁰ The only plausible authority to enact such laws would be the federal legislature. Furthermore, since this phrasing—"shall be regulated by law"—remains consistent throughout the document, it is reasonable to assume that the drafters intended its meaning also to remain consistent, whether or not the substantive provision obviously requires federal law.

Third, despite all of the discussion of federalism during the negotiations, the parties never proposed exclusive areas of regional or governorate authority. This fact is not surprising in light of the unitary, centrally-organized system that defined Iraq's political structure for generations. The result is that there are no provisions—other than perhaps the ambiguous and conflicting language of Article 115—that prohibit federal legislation in any particular substantive area.⁴⁰¹ The absence of a prohibition, therefore, read in conjunction with the long history of centralized authority in Iraq, supports the federal government's exercise of authority at a minimum in those areas enumerated or referred to in the constitution and arguably in any substantive area of regulation.

In short, the constitution appears to give the federal government the power not only to tax but also to legislate in other areas in which the constitution calls for laws to regulate particular constitutional rights and provisions. Ironically, one of the few provisions that naturally would seem to lend itself to a governorate or regional law already has been the object of federal legislative efforts. Article 122(fourth) provides that "[a] law shall regulate the election of the Governorate Council, the governor, and their powers."⁴⁰² In December 2005, the TNA passed legislation on governorate elections that applied throughout Iraq, including Kurdistan.⁴⁰³ Thus, even in an area in which regions or governorates appear to have a valid basis to draft the relevant legislation, the federal government has already stepped in to do so.

3. *Overriding Federal Law*

Notwithstanding the federal government's authority to legislate widely, its ability to enforce its laws in areas of concurrent authority is uncertain when contrary regional or governorate legislation exists. Article

399. IRAQ CONST. art. 12(first).

400. *Id.* art. 124(second).

401. By contrast, the Tenth Amendment to the U.S. Constitution expressly carves out areas of exclusive state authority by providing that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

402. IRAQ CONST. art. 122(fourth).

403. Although the law passed the TNA, over Kurdish objections, the transitional period ended before this law was signed and published in the Official Gazette. As a result the law never went into effect. At the time of publication, however, the COR was working on legislation prescribing the powers of the governorates and intended to begin drafting a new law on the elections of governorate officials. Thus, it appears that the national legislature continues to believe that it has the authority to pass federal legislation in this area.

121(second) permits the regional government to “amend the application of national legislation within that region” when there is a “contradiction between regional and national legislation” in an area outside the federal government’s exclusive authority.⁴⁰⁴ Article 115, despite its overall ambiguity, appears to permit regional or governorate legislation in areas of concurrent authority to trump federal law when there is a conflict.⁴⁰⁵ These provisions indicate that, if regions and governorates legislated within the universe of concurrent authority in a way that conflicted with federal law, that sub-federal law would override federal law on the same topic. Thus, for example, if the power to tax were deemed to be a concurrent authority, the federal government imposed a federal income tax of ten percent on all Iraqis, and the KRG enacted a law requiring residents to pay only regional taxes, Article 121 would appear to grant the KRG the authority to “amend” the federal income tax law as it applies in Kurdistan—to the extent it finds the law to be in conflict or inconsistent with the regional law—by limiting or even canceling the federal tax. As with disputes in the oil and gas area, the Federal Supreme Court could play a key role in deciding whether the exercise of federal power could be construed as the exercise of an exclusive authority contained in Article 110 or, if a concurrent authority, whether regional or governorate legislation conflicts with federal law in such a way as to supersede federal law in the relevant region or governorate.

Articles 115 and 121, however, are not necessarily the final word on the reach of federal power. First, the list of exclusive authorities, particularly the treaty power, may allow for a more expansive scope of exclusive federal government authority than appears on first reading. Article 110(first) grants the federal government exclusive authority to “negotiat[e], sign[], and ratify[] international treaties and agreements.”⁴⁰⁶ Nothing in the constitution appears to impose a subject matter limitation on the treaty power.⁴⁰⁷ In fact, Iraq’s treaty law, Law No. 111 of 1979, provides a defini-

404. IRAQ CONST. art. 121(second).

405. *Id.* art. 115.

406. *Id.* art. 110(first). Article 110’s chapeau clause states that the federal government “shall have exclusive authorities in the following matters.” This formulation leaves some ambiguity as to whether the list provided is exhaustive or illustrative. Presumably, if it were an exhaustive list, the drafters could have more narrowly provided that the federal government “shall have exclusive authorities *only* in the following matters.” On the other hand, if it were illustrative, the provision could have stated that the federal government shall have “exclusive authority in matters of national concern, *including*.” Although the drafters did not address this potential ambiguity, the tenor of the discussions seemed to assume that federal government power would be relatively limited, which supports interpreting the chapeau narrowly.

407. In the U.S. context, the Supreme Court has held that the treaty power can be used to regulate matters beyond the scope of Congress’s legislative power, but also acknowledged that there may be some qualifications on this power. See *Missouri v. Holland*, 252 U.S. 416 (1920).

We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, ‘a

tion of "international agreement" that is largely process-oriented. An agreement constitutes an "international agreement" if the agreement is (1) between the Republic of Iraq and other states, governments, or international organizations, and (2) entered with the intent "to produce legal effects subject to provisions of international law."⁴⁰⁸

Thus, neither the constitution nor Iraqi law would appear to prohibit the federal government from entering into treaties in substantive areas outside the enumerated areas of Article 110. Presumably, in an effort to comply with a ratified international treaty and Article 8 of the constitution, which requires Iraq to respect its international obligations,⁴⁰⁹ the government could enact, and attempt to enforce, implementing legislation regardless of regional or governorate law in the same substantive area. The Federal Supreme Court might be required to adjudicate disputes where such implementing legislation conflicts with regional or governorate laws. Even though it is impossible to predict how the Court might rule on such a question, the treaty power as an exclusive federal authority constitutes a plausible basis on which the government could expand its authority, notwithstanding contrary regional or governorate law.

A second method by which the federal government might override regional or governorate legislation, where Section Four does not expressly grant such authority, may be through the legislative, executive, and judicial enforcement of constitutionally-guaranteed rights. The Iraqi constitution includes many guarantees, some of which will be fleshed out by legislation.⁴¹⁰ It is of course plausible that sub-federal government entities could enact laws that more clearly define and protect federal constitutional rights. Nevertheless, it is undoubtedly part of the federal government's inherent authority, not to mention the drafters' intent, to prescribe, enforce, and adjudicate laws that implement constitutional rights, particularly in a judicial system with a civil law, rather than a common law, history. To the extent that regional or governorate laws provide less protection than is required by the constitution itself, Article 13(second) of the constitution, which does not distinguish between federal and non-federal law, renders

power which must belong to and somewhere reside in every civilized government' is not to be found.

Id. at 433 (citations omitted).

408. Law No. 111 (1979), *supra* note 201, art. 1. The Article states in full:

(1) Provisions of this law shall govern[] international treaties that are concluded in the name of Republic of Iraq or its government with other states, governments, international organizations or any other international corporation recognized by Republic of Iraq.

(2) A treaty is defined as a written agreement concluded between two or more entities mentioned in Para. (1) of this article intended to produce legal effects subject to provisions of international law, regardless of the name of the document(s) (either treaty, accord, agreement, protocol, covenant, conventions, charter, exchanges of letters or exchanges of notes, etc.) when the conditions mentioned in this Paragraph are met.

Id.

409. IRAQ CONST. art. 8.

410. See generally IRAQ CONST., Section Two: Rights and Liberties.

such laws null and void.⁴¹¹ In addition, to the extent regional or governorate laws provide less protection than is provided by rights-implementing federal law—if such law is deemed to constitute the constitutional baseline—federal law arguably should override even that law.

For example, Article 33 guarantees individuals “the right to live in safe environmental conditions,” and requires the state to “undertake the protection and preservation of the environment and its biological diversity.”⁴¹² Environmental regulation is an area of concurrent authority in Section Four⁴¹³ and, thus, Articles 115 and 121 would appear to allow regional and governorate governments to enact legislation that overrides federal environmental law. Such legislation may be permissible, but only to the extent it ensures “safe environmental conditions”—an admittedly capacious standard.⁴¹⁴ Here, as in other areas, the Supreme Court could have an important role in determining what this standard means. If the federal government has legislated in this area in a way that conflicts with regional law, moreover, the Court must decide whether the federal law embodies or surpasses the constitutional requirement and, depending on that answer, decide whether that federal law should override the regional or governorate legislation. If the Court were to find that the federal law only provides more detailed rules implementing the constitutional standard, that law should likely override conflicting and less-protective regional or governorate law, notwithstanding Articles 115 and 121.

In sum, although there has been great criticism that the constitution weakens the federal government to the breaking point, there is nevertheless a basis in the drafters’ intent, the text, and the structure of the constitution for the federal legislative branch to assert, and the federal judiciary to affirm, a more robust federal power than initially imagined.

VII. Section Five: Powers of the Regions

Whereas Section Four is concerned with the allocation of substantive authorities between the federal government and the governments of regions and governorates, Section Five of the constitution focuses on the structure of the federalist system. Section Five affirms the existence of the Kurdistan region;⁴¹⁵ establishes that a future law will establish the procedures for the formation of regions;⁴¹⁶ lays out the powers, rights, and obligations of the regions;⁴¹⁷ and establishes the basic structure of government of the governorates not organized into a region.⁴¹⁸ Articles 118 and 119, which together constitute an extremely streamlined compromise on the formation of future regions, have proved significant in the first term of the

411. IRAQ CONST. art. 13(second).

412. *Id.* art. 33.

413. *Id.* art. 114(third).

414. *Id.* art. 33.

415. *Id.* art. 117.

416. *Id.* art. 118.

417. *Id.* art. 121.

418. *Id.* art. 122.

COR, particularly because Article 118 required the COR, within six months of its first session, to enact a new law defining the procedures to form regions.⁴¹⁹

A. Federalist System

Article 116 states, "The federal system in the Republic of Iraq is made up of a decentralized capital, regions and governorates, and local administrations."⁴²⁰ This provision continued the federal system created by the TAL.⁴²¹ That federal system was a notable change from Saddam Hussein's heavily centralized government, although even under Saddam Iraq was not a completely unitary state.⁴²²

As a practical matter, Iraq underwent forced decentralization in 1991, when the United States, United Kingdom, and France set up a no-fly zone over parts of northern and southern Iraq.⁴²³ As a result of the no-fly zone over northern Iraq (including over the Kurdish region), which protected the area from attacks by the central Iraqi government, the Kurds were able to exercise greater autonomy than they had before the first Gulf War. As a result, the Kurdish region, encompassing parts of a number of governorates, including Dohuk, Arbil, and Sulaimaniya, expanded their regional governance structures, including by electing a Kurdish Parliament in May 1992, and forming a Cabinet in September 1996.⁴²⁴ The TAL recognized the KRG in Article 53, defining its area of jurisdiction as those "territories that were administered by [] that government on 19 March 2003 in the governorates of Dohuk, Arbil, Sulaimaniya, Kirkuk, Diyala and Neneveh."⁴²⁵ Although Iraq historically had been broken down into eigh-

419. *Id.* arts. 118–19. The COR enacted its "regions" law on October 11, 2006. See *infra* text accompany notes 482–486.

420. *Id.* art. 116.

421. TAL, *supra* note 28, art. 4.

422. See CENTRAL INTELLIGENCE AGENCY, POLITICAL AND PERSONALITY HANDBOOK OF IRAQ (1992), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB167/06.pdf> (stating that Saddam built a "powerful, centralized political machine" in which he and a few trusted family members and lieutenants made all key decisions in Iraq); CORDESMAN & HASHIM, *supra* note 119, at 36–56 (describing Saddam's ability to exert control over several strong instruments of state power, including the Revolutionary Command Council, the Ba'ath Party, and the military); *id.* at 62 (noting that the divisions between the "center," the Kurds, and the Shia steadily widened after the late 1960s).

423. See *Containment: The Iraqi No-Fly Zones*, BBC News, Dec. 29, 1998, http://news.bbc.co.uk/2/hi/events/crisis_in_the_gulf/forces_and_firepower/244364.stm; Jim Garamone, *U.S. Responds to Iraqi Aggression, Extends No-Fly*, *Amer. Forces Press Serv.*, Sept. 4, 1996, available at http://www.defenselink.mil/news/Sep1996/n09041996_9609041.html.

424. Kurdistan Regional Government, *About KRG: Structure and Mission*, <http://old.krg.org/about/background.asp> (last visited Feb. 22, 2007). The Cabinet includes a Prime Minister, fifteen Ministries, and five ministers without portfolio. *Id.* The KRG appears to be in the process of updating its regional constitution. See Adnan Hussein, *Interview with Iraqi Kurdish Leader Masud Barzani*, *ASHARQ AL-AWSAT* (Aug. 11, 2005), available at <http://www.asharqalawsat.com/english/news.asp?id=2578§ion=3>.

425. TAL, *supra* note 28, art. 53. The so-called "green line" demarcates the border between the KRG and the rest of Iraq. Liam Anderson & Gareth Stansfield, *The Implications of Elections for Federalism in Iraq: Toward a Five-Region Model*, 35 *PUBLIUS: THE JOUR-*

teen governorates,⁴²⁶ the areas outside of the KRG remained under the strong control of the federal government, even after 1991.⁴²⁷ Perhaps for that reason, none of the governorates other than Dohuk, Arbil, and Sulaimaniya banded together to form a region—an entity with size and powers somewhere between a governorate and the federal government.⁴²⁸

The TAL contemplated that other governorates might band together to form regions, but it imposed certain limitations on this. First, no more than three governorates were permitted to form a region, and Baghdad and Kirkuk were precluded from being part of a region.⁴²⁹ Second, the National Assembly would have had to consider and enact legislation establishing the mechanism by which regions could form, and people from the relevant governorates would have had to approve the legislation in a referendum.⁴³⁰ The National Assembly, however, never drafted such legislation.

Even before actual constitutional negotiations had begun, it was clear that the negotiators would have to grapple with several important issues: whether Iraq's constitution would establish a federalist system; whether the constitution would permit areas other than the KRG to form regions, and, if so, how those regions might form; what kinds of powers the regions and governorates might have vis-à-vis the federal powers; and what the political and geographic ramifications of a federalist system might be for Iraq. As noted earlier, one early Sunni concern was that the Shia would consolidate their power in a nine-governorate region that would closely associate itself with Iran.⁴³¹ Another concern was that those living in oil-rich governorates or regions would benefit economically at the expense of those living in resource-poor areas, even though the constitution would ultimately state that oil and gas were owned by all the people of Iraq.⁴³²

At the same time, many in Iraq recognized that the Kurds would insist

NAL OF FEDERALISM 359, 370 fig. 2 (2005) (illustrating the border of the KRG as defined by the TAL), available at <http://publius.oxfordjournals.org/cgi/reprint/35/3/359.pdf>. Different entities have different understandings of the exact path of this border. In particular, the KRG has a much more expansive understanding of what lands lie north of the line, i.e., within the jurisdiction of the KRG. Associated Press, *Kurdish Leaders Present Redrawn Map with Larger Kurdistan*, July 22, 2005, available at http://www.krg.org/articles/article_detail.asp?RubricNr=&ArticleNr=4744&LangNr=12&LNNr=28&RNNr=44.

426. Anderson & Stansfield, *supra* note 425, at 369 n.33.

427. For example, Saddam's central government suppressed a large-scale Shia uprising in southern Iraq immediately after the Gulf War, and, from 1991–96, rooted out Shiites who had fled to the marsh areas in southern Iraq. CORDESMAN & HASHIM, *supra* note 119, at 103–07.

428. See, e.g., IRAQ CONST. art. 121(fifth) (granting regions but not governorates the right to establish and organize internal security forces); Anderson & Stansfield, *supra* note 425, p. 376 (noting that five regions in Iraq would have more power than eighteen governorates, because the regions would have greater territory and population than individual governorates and therefore would have greater influence).

429. TAL, *supra* note 28, art. 53(C).

430. *Id.*

431. The nine-governorate region would consist of the governorates of Muthanna, Najaf, Karbala, Qadisiyah, Babil, Wasit, Maysan, Thi-Qar, and Basrah.

432. IRAQ CONST. art. 110.

that the KRG's powers and authorities, as outlined in the TAL,⁴³³ remain unaltered in the constitution. As noted above, the TAL recognized a significant level of autonomy for the KRG. The TAL permitted the KRG to continue to perform its governmental functions through the transitional period except in areas falling under exclusive federal competence and required federal government financing for these functions.⁴³⁴ The TAL also provided that the KRG would retain "regional control over police forces and internal security."⁴³⁵ Functionally, this meant that the KRG was able to keep its *pesh merga* militia as an internal security force in the region.⁴³⁶ It also gave the KRG the right to impose taxes and fees within the Kurdistan region.⁴³⁷ Finally, and importantly for the constitutional negotiations, the TAL permitted the Kurdistan National Assembly to "amend the application of any [federal] law within the Kurdistan region, but only to the extent that [the amendment] relates to matters that are not within" the scope of certain articles defining areas within the exclusive competence of the federal government.⁴³⁸ As discussed above, this provision gave a sub-federal entity the ability to override federal law in many areas.⁴³⁹

Thus, negotiators faced a number of practical limitations going into the negotiations. First, the Kurds would insist on preserving the same amount of autonomy under the constitution that they had gained under the TAL. Second, the Shia were likely to insist on having the same opportunity to form regions that the Kurds had, and on giving those regions the same level of power as the KRG. Third, the Sunnis would be very uncomfortable with further devolution of central government power to regions, due to concerns about balance of power, misallocation of resources, the eventual secession of the Kurds, and an overall, historically-based comfort with a strong central government, a sentiment many other countries in the region shared.

B. Structure of Regions and Governorates

Text relating to the structure of regions and governorates did not appear in the first several iterations of the draft constitution, likely because the sub-committee working on the issue had internal disagreements about how to proceed on this complicated issue. On July 22, the subcommittee produced a text that laid out in considerable detail the structure of the

433. TAL, *supra* note 28, arts. 53–57.

434. *Id.* art. 53(A).

435. *Id.* art. 54(A).

436. The Kurdistan Democratic Party (KDP) and the Patriotic Union of Kurdistan (PUK), the two main Kurdish parties, together have approximately 50,000 *pesh merga* fighters. The KDP and PUK *pesh merga* helped coalition forces topple Saddam Hussein. Council on Foreign Relations, *Iraq: Security Forces*, Mar. 16, 2004, at <http://www.cfr.org/publication/7811/iraq.html>.

437. TAL, *supra* note 28, art. 54(A).

438. *Id.* art. 54(B).

439. *See supra* Part VI.C.3.

regional governments.⁴⁴⁰ The text gave the regional governments legislative, executive, and judicial powers and, although it did not specify how regions would be created, stated that regions would be made of two or more governorates.⁴⁴¹ Each region would have had a “regional legislative council” that acted in accordance with a regional constitution approved by a majority of the region’s population. The draft also provided that each region would have a President, who would represent his region abroad and before the federal government, as well as a Regional Council of Ministers that would exercise the authorities set forth in the regional constitution.⁴⁴² A region’s revenues would come from grants from the federal government, from the region’s own resources, and from an allotted quota of national natural resources.⁴⁴³ Regional governments would be responsible for all of the administrative requirements of the regions, including the administration of the internal security of the region.⁴⁴⁴ Finally, the regional judicial authority would have been composed of a regional judicial council and various courts under it, with the regional Court of Cassation acting as the supreme court of the region.⁴⁴⁵

The early draft provisions on regions and governorates contained a number of latent problems. First, the language was not precise as to whether it intended to grant regions sole authority over those affairs not exclusively dedicated to the federal government. The August 2 draft gave the regions the authority to “exercise their powers within their administrative borders regarding all the affairs over which the federal government does not have authority.”⁴⁴⁶ This language suggested that, other than the powers expressly allotted to the federal government—which at that time were only the powers listed in the exclusive authorities section⁴⁴⁷—the regional governments could have exclusive powers in all other areas. Without greater textual clarity, however, this language might have led to power struggles between federal and regional authorities.

A second problem was that the administrative capabilities of governorates and, consequently, of any new regions that might form would be relatively undeveloped. This, then, could have proven to be a destabilizing provision because it would have granted regions more authorities than they were capable of exercising effectively. These problems likely would have manifested themselves in particular in the area of security. The assignment of responsibility to the regional government for the internal

440. See IRAQ CONST. § 4 (July 22, 2005 draft).

441. *Id.* § 4, arts. 2-5.

442. *Id.* § 4, arts. 14, 16-18.

443. *Id.* § 4, art. 19. It is not clear how Iraq would have distinguished between nationwide natural resources, which were to be allocated among the regions, and regionally-owned resources, to be kept by the regions in which the resources were found.

444. *Id.* § 4, art. 20.

445. *Id.* § 4, art. 23. The July 22 draft also contained a short chapter on governorates that looks very similar to the constitution’s Article 122. Compare *id.* § 4, art. 27, with IRAQ CONST. art. 122.

446. IRAQ CONST. § 4, art. 3 (Aug. 2, 2005 draft).

447. IRAQ CONST. § 5 (July 22, 2005 draft).

security of its own region,⁴⁴⁸ coupled with the fact that Baghdad itself was deemed a region,⁴⁴⁹ would have left the Ministry of Interior with very little control over police forces in the country, which would have complicated efforts to create nation-wide, multi-sectarian Iraqi police and security forces.

Third, as with the regions, the July 22 draft would have granted governorates “authorities that are not within the jurisdiction of the federal authorities.”⁴⁵⁰ This could have been read to grant governorates a wide scope of authorities at the expense of the federal government, and to do so before governorates were ready to assume that role. As discussed above, this assertion of governorate authority resurfaced late in the negotiations, appearing to give governorates the authority not only to regulate in areas outside exclusive federal government authority but also to override inconsistent federal legislation in those non-exclusive areas.⁴⁵¹ This potential problem introduced by the July 22 draft, therefore, remains in the final constitution, in Section Four.⁴⁵²

The July 28 Kurdish proposal for the draft constitution would have given extraordinary powers to the regions and governorates.⁴⁵³ While only a few of this draft's provisions ultimately were adopted, the document illuminates the Kurds' initial negotiating position and how much power and autonomy they sought for themselves. The draft described Iraq as a “voluntary federation;”⁴⁵⁴ gave governorates that border foreign countries the power to maintain “self-defense forces” to protect those borders;⁴⁵⁵ gave every governorate the right to have a democratic constitution;⁴⁵⁶ required national legislation that would affect a governorate to be subject to approval by the affected governorate council;⁴⁵⁷ and established the boundaries of “Kurdistan” based on a map approved by the Kurdistan National Assembly.⁴⁵⁸ Article 61 clearly created the possibility of secession, as it gave the citizens of Kurdistan the right to “determine their destiny” through a referendum after eight years under the federal constitution or if Iraq changes its federal democratic system or if Kurdistan is subject to aggression or oppression, or the seizure of any of its lands.⁴⁵⁹ The Kurdish proposal also would have affirmed the actions of the legislative, executive, and judicial authorities of the KRG that had been operating since 1992—which is effectively what Article 141 of the final Constitution does—and would have given the KRG authorities the right to “stop the validity of”

448. See *id.* § 4, art. 20; IRAQ CONST. § 4, art. 21 (Aug. 2, 2005 draft).

449. IRAQ CONST. § 4, ch. 7 (Aug. 2, 2005 draft).

450. IRAQ CONST. § 4, art. 27 (July 22, 2005 draft).

451. IRAQ CONST. § 5, art. 4 (Aug. 15, 2005 draft) (lacking reference to governorate authorities).

452. IRAQ CONST. art. 115.

453. See IRAQ CONST. ch. 3, art. 24 (July 28, 2005 KRG draft).

454. See *id.* ch. 1, art. 3.

455. *Id.* § 6.

456. *Id.* § 11.

457. *Id.* § arts. 39, 41.

458. *Id.* art. 60.

459. *Id.* art. 61.

federal laws and resolutions in Kurdistan if they were “irrelevant to the federal government in the region.”⁴⁶⁰ Finally, the Kurdish draft would have prohibited amendments to the Constitution that “harm[ed], in one way or another, the rights of the Iraqi people, or the principles of democracy, or the rights of the federal provinces, or the parliamentary, federal, pluralistic system” unless both the national parliament and the councils of the various federal regions approved the amendments.⁴⁶¹ This provision undoubtedly was the source of the text in Article 126(fourth), which provides that the constitution may not be amended if the amendment detracts from the powers of the regions that are not within the exclusive federal power, unless both the legislative authority of the affected region and the majority of the region approve the amendment.⁴⁶²

C. Formation of Regions

The earliest versions of these articles relating to the powers of the regions were silent on the most provocative issue in this section—how regions other than the Kurdish region would be formed. However, the August 10 draft started to address this issue in detail. That draft stated that regions were to be made up of one or more governorates, and set out in greater detail how regions would be formed.⁴⁶³ There were three steps: (1) the COR would adopt a law setting forth “common conditions and procedures” by which one or more governorates would be entitled to form a region; (2) the Governorate Councils of each of the relevant governorates would have to approve the formation of the region by a two-thirds vote; and (3) the people of the affected governorates would each have to approve the formation of the region by a majority vote in a referendum.⁴⁶⁴ This section also recognized Kurdistan as a region.⁴⁶⁵ Governorates would have exercised the powers given to them by law until such time as they decided to form a region.⁴⁶⁶ As a substantive matter, this draft would have permitted the regions “to acquire varying degrees of decentralized authorities, . . . depending on the aspirations of the people of each governorate.”⁴⁶⁷

Some—in particular, certain Sunni leaders—were concerned that this draft articulated too concretely the process by which additional regions would be established. Their preference appears to have been to affirm the existence of the KRG but to make no provision for further regions. In fact, some Sunnis objected to the use of the word “*fidirali*,” or “federalism,” at all in the constitution, preferring the Arabic word “*ittihadi*,” or “unionist”).⁴⁶⁸

460. *Id.* art. 80. The precise meaning of the phrase “irrelevant to the federal government in the region” is not clear.

461. *Id.* art. 81.

462. IRAQ CONST. art. 126(fourth).

463. IRAQ CONST. § 4, arts. 2-3 (Aug. 10, 2005 draft).

464. *Id.* art. 3.

465. *Id.* art. 4.

466. *Id.* art. 8.

467. *Id.* art. 1(c).

468. See Ibrahim Al-Marashi, *Iraq's Constitutional Debate*, 9 MIDDLE E. REV. INT'L AFF. 139, 150 (Sept. 2005), available at <http://meria.idc.ac.il/journal/2005/issue3/Al%20>

Specifically, the Sunnis' greatest concern seemed to be a fear that the nine southern governorates with Shia majority populations were going to be able to unite into a single "super-region" that might exercise undue control over natural resources in the south and ultimately lead to the fragmentation of the country.⁴⁶⁹ Therefore, if the constitution were to discuss region formation at all, the Sunnis wanted to add a number of additional conditions to the formation of regions. First, they wanted any law establishing the procedures to be adopted with a two-thirds majority vote. Second, they wanted the people in the governorates to approve the region in a referendum by two-thirds majority. Third, they wanted to require final approval of a particular regional formation by a two-thirds majority of the COR. Finally, they sought a three-governorate ceiling on the number of governorates that could form a region.

The next iteration of text, on August 17, looked more like the original July version of the "power of the regions" section, but included a new provision explaining how governorates could form regions. The two options in the August 17 draft did not match up with the four-step process in the draft favored by some Sunni negotiators. Instead, the text stated:

A governorate or more shall have the right to form a region on the basis of a request for a referendum submitted in one of the following two methods:

(A) A request by one-third of the members of each [Governorate Council] that intends to form a region.

(B) A request by 1/10 of the voters in the governorates which intend to form a region."⁴⁷⁰

This language ended up becoming Article 119 of the constitution,⁴⁷¹ thereby providing a constitutionally based mechanism for triggering the process of region formation.

Negotiators proposed many possible compromises and variants on region-formation mechanisms in an effort to reach agreement. There were two broad categories of proposals: (1) additional procedural obstacles to the formation process, and (2) substantive constraints on the power of regions. The former category included such proposals as forcing governorates to wait four years after the constitution's entry into force to form regions; requiring that a regional constitution be approved by the Fed-

Marishi%20pdf.pdf (stating that the final text of the constitution uses the word "*ittihadi*" rather than "*fidirali*," presumably to stress that the constitution was intended to unite, not divide, the nation).

469. Filkins, *supra* note 371, at 10. Filkins notes,

Such a deal [to permit the voters of each province to decide by referendum whether they wanted to join other provinces to form a region] would appear to clear the way for the establishment of the federal region envisioned by Abdul Aziz Hakim, the powerful Shiite leader, who publicly endorsed the formation of a nine-province Shiite autonomous area. . . . The Sunni leaders argue that Shiite autonomy, coupled with that already enjoyed by the Kurds, could lead to the dissolution of Iraq.

Id.

470. IRAQ CONST. § 5, art. 24(first) (Aug. 17, 2005 draft).

471. IRAQ CONST. art. 119.

eral Supreme Court before the federal government approved the region; requiring governorates to show that they could deliver certain governmental services before becoming a region; requiring that region formation be approved by votes of governorate councils in two successive electoral terms, before the people living in the governorates that were proposing to form a region voted on it in a referendum; giving the federal government a clear role in approving formation of new regions, or the ability to veto the formation of a region (perhaps by a supermajority of the COR); and limiting the number of governorates that could merge into a region. This last proposal—often expressed as a three governorate limit—was an effort to thwart both the formation of a nine province Shia super-region in the South and the annexation of Kirkuk by the KRG.⁴⁷²

Substantive constraints to counter the perceived damage that could accompany the proliferation of regions included: an emphasis elsewhere in the text on the unity of Iraq; a supremacy clause that made clear that regional constitutions and laws could not contradict the federal constitution; a robust list of exclusive federal authorities; and the grant of exclusive authorities to regions provided that the federal government would have power in all areas outside of that exclusive grant. In the end, none of these ideas garnered enough support.⁴⁷³

By August 18, the negotiators had inserted into the text a provision similar to the one that would prove to be the ultimate compromise: the COR is required to adopt a law that will set forth the requisite “executive procedures” to form a region.⁴⁷⁴ This version would have required an absolute majority vote in the COR (not a simple majority, like the final text), but would not have required that the COR enact such a law within six months from its first sitting (as the final text did).⁴⁷⁵ However, this version still contained the detailed framework for the regions that would be formed.⁴⁷⁶ This level of detail made the Sunnis uncomfortable, since it suggested that the formation of regions was a *fait accompli*. It was not until August 27 that the provision on the issue of region formation crystallized in its final form.⁴⁷⁷ At the same time, the more specific provisions about the structures of future regions fell away,⁴⁷⁸ either to be left for fur-

472. The city of Kirkuk is rich in oil. Since at least 1970, the Kurds have been interested in including Kirkuk within the Kurdistan region. CORDESMAN & HASHIM, *supra* note 119, at 73.

473. The final text did include one potential constraint on the formation of new regions. Article 121(fifth) provides that “the regional government shall be responsible for all the administrative requirements of the region.” IRAQ CONST. art. 121(fifth). Though perhaps not intended as a restriction, this language might provide a reasonable basis on which the COR could enact a law that defines such “administrative requirements” broadly and requires that a proposed region demonstrate its capacity to fulfill those requirements before becoming a region.

474. IRAQ CONST. § 5, art. 24(third) (Aug. 18, 2005 draft).

475. Compare *id.*, with IRAQ CONST. art. 118.

476. IRAQ CONST. § 5 (Aug. 18, 2005 draft).

477. IRAQ CONST. § 5, art. 115 (Aug. 27, 2005 draft).

478. *Id.* § 5, art. 117.

ther definition in a future COR law or to be defined in the constitution of each region.

The new COR took up consideration of this law shortly after it was seated, because the constitution required that the law be passed within the first six months of the COR's term.⁴⁷⁹ Such consideration was, predictably, a source of heated debate: SCIRI leader Abdul Aziz al-Hakim pressed to draft the law shortly after the COR convened, over the objections of Sunnis and Moqtada al-Sadr.⁴⁸⁰ As a compromise, the COR agreed to start drafting the law but to constitute the Constitutional Review Committee (CRC), which, as noted above, started its work on November 15, 2006, and to delay the formation of any region for eighteen months.⁴⁸¹

On October 12, 2006, the COR passed the new law, entitled "Law of the Executive Procedures Regarding the Formation of Regions Pursuant to Articles 117(second), 118, 119, 120, 121 of the Constitution." The law created a relatively simple process for forming regions, reflecting the power within the COR of the United Iraqi Alliance, the Shia bloc that wanted the law to establish few hurdles to the creation of regions. In brief, the law defined a region as consisting "of one province or more, or of two regions or more."⁴⁸² In addition to affirming the basic processes by which the citizens or the governing council of a province (also referred to as a governorate) may form a region, the law determined how a province might accede to an existing region.⁴⁸³ The law assigned to Iraq's Higher Electoral Commission the role of conducting requisite referenda within three months of receiving an appropriate request; explained how citizens in a province are to make known their desire to join a region; described what happens if the Electoral Commission received competing requests for different regional configurations; and defined a successful referendum as one that received a majority of affirmative votes.⁴⁸⁴ The law also set out in great detail how new regions would establish transitional governments to draft regional constitutions.⁴⁸⁵

Virtually none of the compromise ideas that had arisen during constitutional negotiations to appease Sunni fears of regional formation appeared in the final law. The COR gave the federal government no substantive role in approving the formation of regions. There is no require-

479. IRAQ CONST. art. 118.

480. Kenneth Katzman, *Iraq: Elections, Government, and Constitution*, CRS Report 5 (Nov. 2006), available at <http://fpc.state.gov/documents/organization/76838.pdf>.

481. *Id.*

482. Law of the Executive Procedures Regarding the Formation of Regions Pursuant to Articles 117(second), 118, 119, 120, 121 of the Constitution, art. 1 (2006) (Iraq) [hereinafter *Regions Law*].

483. *Id.* art. 2(first)-(third). The law contemplates that a province wishing to accede to a region must submit a request from one-third of its provincial council, accompanied by the approval of one-third of the members of the region at issue. The law does not make clear, however, whether all of the citizens of the existing region participate in the subsequent referendum, or whether only the citizens of the province vote in that referendum.

484. *Id.* arts. 3, 4, 6.

485. *Id.* arts. 13-21.

ment that the regions prove their ability to provide a certain level of governmental services. There is no limit on the number of governorates that may merge into a region. And region formation requires only a simple majority approval by voters in the referendum. The only concession to those concerned about regional formation is the eighteen-month delay before the law takes effect.⁴⁸⁶ Further, the law also leaves a number of important questions unanswered: May a province defect from a region and, if so, how? May a region decide to disband? What happens if a region is unable to come to agreement on a new regional constitution? And precisely what advantages will regions have over provinces, other than the slightly greater authorities given to the regions in the federal constitution? At least some of these questions will presumably be resolved shortly after the eighteen-month deadline, when several Shia-majority provinces will likely attempt to merge into a region.

D. KRG Laws and Decisions

Around August 23 or 24, the Kurds resurrected their wish to ensure that all laws passed by the Kurdistan National Assembly, and all decisions made and contracts entered into by the KRG, since 1992 would remain in effect as long as they did not contradict the federal constitution.⁴⁸⁷ Article 141 of the constitution provides that legislation and “decisions issued” by the KRG, “including court decisions and contracts” since its establishment in 1992, shall be considered valid, provided that they do not contradict the constitution.⁴⁸⁸ This provision almost certainly will prove controversial, particularly to the extent the “contracts” at issue are deemed to include oil contracts to which the KRG is party.

Conclusion

Many in the international community have roundly criticized the new constitution. Groups have described the text as “highly deficient” and a “casualty” of the rushed negotiations.⁴⁸⁹ To be sure, there are several areas of the document that are in obvious need of, or could at least benefit from, more complete treatment, such as the provisions on the second legislative chamber⁴⁹⁰ and the management of and allocation of revenues from natu-

486. *Id.* art. 24.

487. IRAQ CONST. § 6, art. 150 (Aug. 23, 2005 draft).

488. IRAQ CONST. art. 141.

489. See *National Democratic Institute for International Affairs Preliminary Analysis of August 28, 2005, Draft Iraqi Constitution*, at 1 (on file with authors) [hereinafter NDI Report] (“From a technical, drafting standpoint, the text is highly deficient. Aside from problems with translation, many provisions of the constitution are vague, at best, unworkable at worst. Others stand in direct contradiction to one another.”); International Crisis Group, Middle East Briefing No. 19, *Unmaking Iraq: A Constitutional Process Gone Awry*, (Sept. 26, 2005), available at <http://www.crisisgroup.org/home/index.cfm?id=3703> [hereinafter, ICG Briefing] (describing the text as a “casualty” of the rushed drafting process, because many key passages “are both vague and ambiguous and so carry the seeds of future discord”).

490. IRAQ CONST. art. 65.

ral resources.⁴⁹¹ As others have noted, the failure of the negotiators to address some of these significant issues may be largely the result of the time pressure under which Iraqi leaders worked to finish the document,⁴⁹² or may be attributable to the initial chasm between parties on such issues. Although some of this criticism is warranted, it tends to overlook what Iraqi leaders accomplished during their negotiations.

The Iraqi constitution includes a number of significant protections and advances. In the area of individual rights, it includes a strong equality provision,⁴⁹³ significant protection of free speech, religious belief and practice,⁴⁹⁴ and an affirmation that Iraq will comply with its international treaty obligations,⁴⁹⁵ which include its human rights treaty commitments. In the area of government structure, the document establishes a robust parliamentary system and a goal of 25% female representation in the legislature, without temporal limitation.⁴⁹⁶ It also guarantees the independence of the judiciary.⁴⁹⁷ Further, notwithstanding some of the political sensitivities that accompany region formation, the constitution continues a trend initiated by the TAL of devolving governmental power to local authorities, thereby enabling the creation of a stronger connection between citizens and their local government.⁴⁹⁸ Finally, the drafting history, in addition to providing the context for many of the final provisions of the constitution, demonstrates an earnest and painstaking effort by Iraqi leaders to carefully construct compromise language reflecting the political agreements achievable at the time.

The strong criticism of the document tends to focus on the harmful effects of textual ambiguity. Ambiguity certainly can paper over deep, and even irreconcilable, differences or simply reflect inattention to detail. Admittedly, some ambiguities in the Iraqi constitution, such as the failure better to define how the federal and sub-federal entities will control natural resources, could be harmful in the short-term, because Iraqi governmental entities and foreign investors must develop this sector of the economy quickly, and almost certainly must do so before a court has the opportunity to weigh in to clarify the rules.

However, the drafting history also highlights the potential usefulness of ambiguity in the constitution. Ambiguity may serve a useful purpose when there exists a desire to move forward collectively despite political divisions. Instances of ambiguity, even on important issues such as the role of Islam or the structure of the Supreme Court, may in fact enable the parties to move forward productively within the bounds of the constitution.

As we have explained, the final language related to Islam does not

491. *Id.* art. 112(first).

492. See ICG Briefing, *supra* note 489.

493. IRAQ CONST. art. 14.

494. *Id.* arts. 38, 42-43.

495. *Id.* art. 8.

496. *Id.* art. 49.

497. *Id.* art. 87.

498. See *id.* arts. 115, 121.

establish any hard rules as to the status of Islamic law within Iraqi law.⁴⁹⁹ There is language that supports giving Islamic law a predominant place in the legal development of Iraq, but because that language is as much descriptive as it is prescriptive, the language does not require that result.⁵⁰⁰ Moreover, there is also language encompassing other basic legal principles that must be considered alongside Islam-related provisions, which may or may not be compatible with Islamic law principles.⁵⁰¹ Thus, the final language is open to significant interpretation. Were the parties somehow to have struck all references to Islamic law from the constitution and included only secularist provisions, as many Westerners might have desired, the resulting document would have run the risk of becoming irrelevant through its failure to reflect the devoutly religious worldview of much of Iraqi society. Instead, the parties attempted to balance drastically different outlooks on the role of religion in the development of Iraqi law. While the resulting ambiguity may permit an expansion of Islamic law in Iraq, it also allows for the development of a more western, secular humanist outlook. To the extent cultural and social mores in Iraqi society change to support a more liberal expansion of individual rights, there exists language within the Constitution that would support legislative programs reflecting such a change.⁵⁰²

Similarly, the drafters' failure to specify the number of members of the Federal Supreme Court or to indicate what balance of views these members should have actually may help the court emerge as a useful institution in Iraqi society.⁵⁰³ The negotiators had very different ideas as to what a supreme judicial body should look like. The Shia Alliance, representing approximately half of the Iraqi population, preferred a model that resembled the constitutional councils of France and Iran.⁵⁰⁴ The Kurds and other secularists preferred something closer to the judiciary created by the TAL.⁵⁰⁵ Both sides, however, made sacrifices to arrive at a mutually acceptable compromise. While this compromise lacks certain important details and enables Sharia scholars to be part of the Supreme Court, it also requires the COR to enact by two-thirds vote the future law that will describe the makeup of the court,⁵⁰⁶ a requirement that is more likely to produce a balanced approach to the Court's membership. Again, as with the role of Islam in Iraqi law, a court that only represented one side of the political spectrum—by preventing the presence of either Islamic law scholars or civil law-trained judges—may have run the risk of becoming irrelevant to large segments of the Iraqi population. Finally, although providing

499. See *supra* Part I.A.

500. See IRAQ CONST. art. 2(first).

501. See *id.* art. 2(first)(b) and (c).

502. See, e.g., *id.* art. 2(first)(b) and (c).

503. See NDI Report, *supra* note 489, at 2 ("The failure to specify how many judges are to sit on the high court, or to provide any details on the balance of Islamic jurists or other jurists is troubling.").

504. FR. CONST. art. 61; IRAN CONST. arts. 91-99.

505. TAL, *supra* note 28, arts. 43-47.

506. IRAQ CONST. art. 92(second).

more specificity as to the make-up of the court may have helped it begin its work more quickly, there are also precedents for deferring such decisions to future legislation. Indeed, there are many constitutions without such details that nevertheless laid the groundwork for successful high courts.⁵⁰⁷

In sum, the constitution's drafting history as well as the ambiguity in its final language reflects, at times, important and significant compromises among the negotiators. Other instances of ambiguity, moreover, may be a good thing to the extent they serve as an enticement to translate pure power grabs into efforts to argue for interpretations of the constitution (and enact legislation pursuant to the constitution) that improve policymaking. The constitution, like all constitutions, consists of a set of foundational rules and principles with which to work out political disagreements and permits the government and the courts to develop and interpret those guidelines as new disagreements emerge. Of course, for the new constitution truly to become an effective and lasting document, Iraq will need a legislature that is committed to brokering compromise legislation and implementing ambiguous constitutional provisions, a judiciary that is willing to uphold individual rights and help resolve contentious disagreements between federal and sub-federal governments and, perhaps most importantly, a citizenry that is able to turn away from violence and is eager to enforce individual rights and hold its local and national government accountable. It will be difficult for Iraq to move from a society grappling with the current level of violence to one that embraces its newly drafted constitution as its guidestar. One can only hope that the Iraqis eventually see the constitution as something to rally around, as an instrument that provides relatively clear rules at an otherwise chaotic time.

507. See, e.g., U.S. CONST. art. III, § 1 (providing that the judicial Power of the United States shall be vested in one Supreme Court, and that judges of the Supreme Court shall hold their office during good behavior as well as receive compensation for their services, but failing to speak to the composition and membership of the Court); GRUNDGESETZ [GG] [Constitution] art. 94 (F.R.G.) (providing that "[t]he Federal Constitutional Court consists of Federal judges and other members" without any detail on the number of members or the break-down between judges and non-judges). But see, e.g., S. AFR. CONST. art. 167 (specifying that "[t]he Constitutional Court consists of a President, a Deputy President and nine other judges").

